A

TREATISE

ON THE

LEGACY DUTY,

AS ATTACHING ON THE PROPERTY OF
PERSONS DYING ABROAD OR IN GREAT BRITAIN, CONSIDERED
WITH REFERENCE TO

THE LAW OF DOMICILE,

WITH AN

ANALYSIS OF THE STATUTES

AFFECTING THE LEGACY DUTY, AND A REVIEW OF
THE PRINCIPAL CASES ON THIS SUBJECT,

BY

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PREFACE.

In laying before the public this Treatise upon the Attachment of Legacy Duty on the personal estate of a testator, whether bequeathed specifically or devolving on an executor or residuary legatee, (which must be governed by the rules applicable to the law of Domicile) it may be necessary to say a few words, by way of prefatorial explanation.

In the year 1846, the writer's attention was accidentally directed to this subject, by being called upon to advise on the case of an executor residing in this country, whose testator was domiciled in the Island of Antigua, in the West Indies, where he died, and who was called upon to pay a considerable sum of money, claimed by the Commissioners of Stamps, as Legacy Duty on his testator's estate. During the writer's investigation of the law on this subject, which

he found very obscure and quite misapprehended by the public, it occurred to him that the compilation of a practical treatise on so important a branch of the law might be acceptable and serviceable to the profession and the public. So great is the popular ignorance on this subject, that it was not without difficulty the author persuaded the agent of the residuary legatee, in the case to which allusion has been already made, to petition the Commissioners of Stamps for repayment of the Legacy Duty. The sum reclaimed, after the lapse of several months' delay on the part of the Commissioners, was ultimately repaid by them.

Some explanation may be due to the public for the publication of the present work, so soon after that of one similar in its object, which appeared not long since. The facts are simply as follows: The author had, previously to the issuing of Mr. Alcock's Treatise, prepared the one now before the public, in a much larger form than it at present assumes, and already submitted it to the publishers: they however strongly urged the author to issue it in a much more condensed form. This he essayed to do at the expense of considerable time and labour.

In the meantime however, the gentleman above referred to, had prepared and issued his work, and thus this Treatise is subsequent in point of publication, though it will be seen that it was anterior in compilation.

P. L.

Middle Temple,

20*th July*, 1850.

Corrigendum.

Page 3, line 23, *for* "executions," *read* "executors."

SUMMARY

AND

ANALYSIS OF STATUTES,

HAVING

REFERENCE TO THE ATTACHMENT AND PAYMENT OF LEGACY DUTY.

THE first Statute, imposing a duty on Legacies, was the 20th Geo. III., cap. 28, which directed that any receipt in discharge of a legacy, whereof the value did not exceed £20, should be liable to a stamp duty of 2*s.* 6*d.*, and when the amount thereof should be of £20 and under £100, then a stamp duty of 5*s.* and so on according to the value of the legacy. By the 23rd of Geo. III., cap. 58, several additional duties were imposed, while at the same time certain exemptions were introduced in favour of the wife, child, or grandchild of the testator. By the 29th of Geo. III., cap. 51, further duties were imposed upon any receipts for legacies: up to this period it will be remarked that the duty was upon the instrument, *i.e.* the receipt *itself*, and no proof of payment of a legacy was admissible in a court of law, unless the receipt, or document evidencing payment, was stamped according to these acts; and it was absolutely necessary to produce such receipt. But this mode of procedure had its accompanying evils; for the Legacy Acts did not make it compulsory for an executor or administrator to require such a receipt, or for a legatee, or next of kin, to give one, for the legacy or share of the residue of any deceased person's estate. In this manner the revenue suffered considerably, so that it became necessary to adopt some other mode by which the duty would

20 Geo. III., cap. 28.

23 Geo. III., cap. 58.

29 Geo. III., cap. 51.

36 Geo. III., cap. 52.

most certainly attach: accordingly the 36th Geo. III., cap. 52, repealed these three statutes, *i. e.* the 20th Geo. III., cap. 28 (except sec. 3); 23rd Geo. III., cap. 58; 29th Geo. III., cap. 51; and enacted, "*that upon every legacy, specific or pecuniary, or of any other description, of the amount or value of* £20 *or more, given by any will or testamentary instrument of any person who shall die after the passing of this Act, out of the personal estate of the person so dying, and also upon the clear residue, and upon every part of the clear residue of the personal estate of every person who shall so die, whether testate or intestate, and leave personal estate of the clear value of* £100 *or upwards, which shall remain after deducting debts, funeral expenses, and other charges, &c.; there shall be raised, levied, collected and paid unto and for the use of His Majesty, his heirs and successors, the several duties, &c.*"

This Act is set out in all its important sections in an Appendix to this work; at this stage, therefore, we shall only refer, for the sake of convenience, to the 7th section, which explains what testamentary gifts shall be considered as legacies: "*That any gift by will or testamentary disposition of any person dying, after the passing of this Act, which shall by virtue of such will, or testamentary instrument, have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy, within the intent and meaning of this Act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix who shall give the same, except so far as the same shall be paid or satisfied out of such real estate in a due execution of the will or testamentary instrument by which the same shall be given; and every gift which shall have effect*

as a DONATIO MORTIS CAUSA, *shall also be deemed a legacy within the intent and meaning of this Act.*"

37 Geo. III., cap. 135.

The 37th Geo. III., cap. 135, is an Act to explain and amend, in certain cases, so much of the 36th Geo. III., cap. 52, as relates to the payment of money into the Court of Chancery, and paid into the Bank of England, and directs that when so paid, the Acccountant-General's certificate thereof shall be filed in the Report Office, and shall be a warrant to the Bank for the payment of any draft of the Accountant-General to be drawn in respect of such money.

39 Geo. III., cap. 73.

The 39th Geo. III., cap. 73, was passed for the purpose of exempting certain specific legacies given to corporate bodies, and also for exempting certain articles given by the will of the late Rev. Clayton Mordaunt Cracherod to the trustees of the British Museum, 12th of July, 1799. This Act appears to have been unnecessary, since, on reference to the 14th sec. of the 36th Geo. III., cap. 52, *(see Appendix,)* it would appear that that section had already provided for similar cases.

42 Geo. III., cap. 99.

The 42nd Geo. III., cap. 99, gives the Commissioners of Stamps and Taxes power to compel the payment of the duties imposed by the 36th Geo. III., cap. 52, by defaulting executions within a reasonable time; and the Court of Exchequer, on application, will grant a rule to show cause why the executors should not deliver in an account upon oath of the legacies paid or to be paid.

44 Geo. III. cap. 98.

The 44th Geo. III., cap. 98, altered in some measure the effect of 36th Geo. III., cap. 52, which merely imposed the duties on legacies given by the will of persons dying after the date of that Act, while the 44th Geo. III., cap. 98, fixed the attachment of Legacy Duty on all legatees to whom payment should be made, after its passing, *without reference to the period of the testator's decease,* allowing two years to expire before it should attach on legatees taking under the will of

persons dying previously to the 26th of April, 1796, being the date of 36th Geo. III., cap. 52.

45 Geo. III., cap. 28.

The 45th Geo. III., cap. 28, provided certain additional duties, and likewise imposed the duty on legacies specific or pecuniary, or of any other description charged upon or payable out of *real* or personal estate, and on shares of monies arising from the sale of real estate by any will or testamentary disposition. This was the first statute which imposed a duty on legacies payable out of real estate.

48 Geo. III., cap. 149, sec. 44.

By the 44th section of 48th Geo. III., cap. 149, an alteration is made in the 28th and 29th sections of the 36th Geo. III., cap. 52, by that section enacting that in all cases not provided for, where any receipt or discharge given for any legacy, or for the residue, or any share of the residue, of any personal estate, which shall have been given by will or other testamentary instrument, or have devolved to any person or persons upon intestacy, shall be brought to the head office to be stamped after the expiration of three calendar months from the date thereof, it shall be lawful for the said Commissioners to cause the same to be duly stamped, for making the same available, on payment of the duty, which shall be payable in respect thereof, together with the penalty incurred in consequence of the same not having been brought to be stamped, before the expiration of such three calendar months, and when any such receipt or discharge shall have been signed out of *Great Britain,* if the same shall be brought to be stamped within twenty-one days after its being received in *Great Britain,* it shall be lawful for the Commissioners to remit any penalty that may have been incurred thereon, and to cause the same to be duly stamped, on payment of the duty payable in respect thereof, any thing contained in any former Act or Acts to the contrary notwithstanding.

55 Geo. III., cap. 184.

The 55th Geo. III., cap. 184, repeals *inter alia* the provisions contained in the 48th Geo. III., cap. 149, respecting

legacies and successions to personal estate upon intestacy, then payable in *Great Britain*, and grants new duties in lieu thereof, which are found in the Schedule of this Act: it relates principally to probate and administration, but additional duties, and exemptions from duty, are included in the Schedule to this Act, by which it appears *the duties are now imposed;* a distinction in the assessment is made between wills and administrations of persons who died before the 5th of April, 1805, and those who have died subsequently.

The 57th Geo. III., cap. 105, s. 25, contains a provision, and which is continued in subsequent statutes, exempting in certain cases property in Savings' Banks from Legacy Duty.

5th & 6th Vic., cap. 82.

The 5th & 6th Vic., cap. 82, is an act to assimilate the Stamp Duties in *Great Britain* and Ireland, and to make regulations for collecting and managing the same, until the Tenth Day of October, 1845. By the 9th section, the Commissioners of Stamps and Taxes shall from time to time provide dies for expressing and denoting the rate *per centum* of the Legacy Duties upon the receipts and discharges to be given for legacies and shares of personal estate, &c. The 37th section provides that the Legacy Duty shall be paid by the executors or administrators on retaining or paying legacies, and if the duty be not paid, although deducted by the executor, the amount thereof shall be a debt to Her Majesty from the executor or administrator; but if not deducted by the executor, then the amount shall be a debt to Her Majesty from both the executor and the legatee. Trustees are to pay duties on legacies charged on real estate, and if there be no trustee, then the party entitled to such real estate is to pay, or the person empowered or required to pay or satisfy any such legacy; and the said duties are to be retained by the person paying or satisfying any such legacy, or share of money, and are to be accounted for, satisfied, and paid at certain times, in a certain

manner, and according to certain rules and regulations in the Act specified in respect of the duties granted on legacies payable out of personal estate; and in case the said duties are not paid or satisfied according to the provisions herein contained, then, and in every such case, such duty is to be a debt to Her Majesty, her heirs and successors, of and from the trustee of such real estate as aforesaid, or the person entitled thereto, subject to such legacies, and also of and from the person to whom the same shall have been paid without the duty chargeable thereon having been first deducted.

The 38th section then explains what shall be deemed a legacy under this Act.

Receipts for legacies to be stamped within twenty-one days after the date.

The 39th section enacts that every receipt or discharge for any legacy, or residue, or part thereof, shall be brought within the space of twenty-one days after the date thereof to the head office of the Commissioners of Stamps and Taxes, in *Dublin, &c.*, and provides a penalty if not stamped within twenty-one days. It is nevertheless lawful to carry such receipt or discharge to the said head office to be stamped in like manner within three calendar months after the date thereof, paying the duty for the same, and also a further sum of £10 *per centum* on such duty by way of penalty for not having before paid such duty; on payment of which duty the Commissioners are authorised and required to stamp such receipt or discharge in the same manner as if the same had been brought to the office within the space of twenty-one days from the date thereof: and where any receipts or discharges as aforesaid shall have been signed out of the United Kingdom, it shall be lawful for the said Commissioners to remit any penalty which may have been incurred thereon, and to cause the same to be duly stamped, on payment of the duty payable in respect thereof.

Penalty if not stamped within twenty-one days.

Receipts signed out of the United Kingdom.

The 40th section enacts that penalties may be sued for as penalties, under the Stamp Act passed in the 56th year of

the Reign of George III., subject to any such appeal as therein mentioned, &c.

The 8th and 9th Vic., cap. 2, is an Act simply for the purpose of continuing for three years the Stamp Duties imposed by the 5th and 6th Vic., cap. 82.

The 8th and 9th Vic., cap. 76, is, as its title expresses it to be, an Act to increase the Stamp Duty on licenses to appraisers; to reduce the Stamp Duties on registry searches in Ireland, to amend the law relating to the duties on legacies, and also to amend an Act passed in the previous session for regulating the issue of bank notes.

The section referring to legacies is the 4th, and is to the following effect:—

Certain Gifts by will or testamentary instrument to be deemed legacies.

4th sec. "And whereas, under and by virtue of the said "several recited Acts, certain duties have been granted, and "are now payable in *Great Britain* and *Ireland*, respectively, "upon legacies, and doubts have been entertained whether "certain gifts by will or testamentary instrument, are "legacies, liable to the said duty, and it is expedient to "remove such doubt; be it therefore enacted that from and "after the passing of this Act, every gift by any will "or testamentary instrument of any person, which by "virtue of any such will or testamentary instrument is "or shall be payable, or shall have effect, or be satisfied "out of the personal or moveable estate or effects of such "person, or out of any personal or moveable estate or effects "which such person hath had, or shall have had power to "dispose of, or which gift is or shall be payable, or shall "have effect, or be satisfied out of, or is or shall be charged "or rendered a burden upon the real or heritable estate "of such person or any real or heritable estate, or the "rents or profits thereof, which such person hath had "or shall have had any right or power to charge, burden, "or effect with the payment of money, or out of or upon

" monies to arise by the sale, burden, mortgage, or other " disposition of any such real or heritable estate, or any " part thereof, whether such gift shall be by way of " annuity, or in any other form, and also every gift which " shall have effect as a *donatio mortis causâ*, shall be " deemed a legacy within the true intent and meaning of " all the several Acts granting or relating to duties on " legacies in *Great Britain and Ireland* respectively, and " shall be subject and liable to the said duties accord- " ingly. Provided always, that no sum of money which by " any marriage settlement is or shall be subjected to any " limited power of appointment, to or for the benefit of any " person or persons therein specially named or described as " the object or objects of such power, or to or for the " benefit of the issue of any such person or persons, shall " be liable to the said duties on legacies under the will in " which such sum is or shall be appointed or apportioned in " exercise of such limited power.

Having endeavoured to give our readers a brief summary of the principal Acts of Parliament having reference to the duty on legacies, let us now consider those cases which may be considered as having settled the law on this subject.

The plan pursued in the arrangement of this work has been adopted under the idea that in printing the three chief authorities somewhat at length, and appending to them notes in distinct columns, the labour of the reader would be materially decreased, and his attention less liable to be distracted than if the whole had been printed together.

IN RE EWIN.

AMERICAN, AUSTRIAN, FRENCH, and RUSSIAN Stock, the property of a testator domiciled in this country, is liable to Legacy Duty.

1 Cromp. & Jervis, 151. 1 Tyrwhits, 91, 246, 251, 254.

IN this case, an order was obtained (in 1830), under the 42nd Geo. III., cap. 99, sec. 2, calling upon an executor to shew cause why he should not deliver an account of the legacies and property of the testator, and pay the legacy duties. In opposition to this rule, affidavits were filed, from which it appeared, that the testator, who was domiciled in England, died possessed of considerable property, in the American, Austrian, French, and Russian funds, which funds were transferable, and the dividends payable in those respective countries only. It appeared further, that the debts of the testator had been paid out of personal property in this country, and that the residuary legatee had required the executor to transfer into his name the funds in those countries respectively. It also appeared, that the stock had been transferred into the name of the executor, and that he had dealt with and transferred the dividends to the legatees by means of a power of attorney; but the court held that the funds in question were personal property, and, as such, followed the person, and were not to be regulated in any respect by the laws of the place where they were situated.

Alexander, L. C. B., says: "I have not had, during the course of this argument, any doubt, notwithstanding the great ability evinced upon the part of those who contend that this duty ought not to be paid. It seems to me, according to

the true meaning and construction of this Act of Parliament,[a] that it must be paid. This is an Act which imposes a duty upon legacies and shares of personal estate, and the duty attaches the moment they are paid; and the transaction pointed out as that upon which the duty is to be paid, is to be evidenced by the receipt. *The fact is, that it is a charge upon the personal estate which belonged to an intestate or testator, and which is to be handed over to the legatee.* Then the question is, whether the circumstances of this case bring the legatee and the executor of the estate within those descriptions that are comprised in this Act. In the first place, it must be personal estate. I agree entirely that the circumstances stated in these affidavits prove this, if there were any doubt about it, to be personal estate, because, as is stated, the executor has taken it, he has dealt with it as executor, and he has, as executor, authorized the delivery of it over to the legatee. Under all these circumstances, how can it be contended, with any plausibility, that this is not personal estate? Then, so far as the subject-matter of the thing goes, it is clearly within the Act of Parliament. But then, can it be said that the persons concerned in this transaction are not within the Act of Parliament? The Act says: *That every personal or moveable estate* shall be charged with these duties upon all legacies and successions; and then it goes on to charge upon these legacies and successions, particular sums, according to the amount or value. The words are general, 'every person.'

"It must be construed, I think, that this particular Act, in speaking of legacies, is confined to *Great Britain*.

"When persons die in *India*, whose estates, though the estates of *British* subjects, are distributed in *India*, and are delivered over to the several legatees, whether pecuniary or

(*a*) Refers to the 55th Geo. III. cap. 184: Schedule part 3, and 36th Geo. III., cap. 52, sec. 6.

residuary legatees in *India*, it has never been the practice, nor was it intended by this Act of Parliament, that such estates should be chargeable with the duty. Under these circumstances, although I do not doubt but that the reasons given by the Vice Chancellor, in the case decided by him, (a) were satisfactory, and were justified under the particular circumstances of that case, it requires the particular circumstances of that case to bring such legacy and payment within the operation of this Act of Parliament. But it can never be doubted that the Act of Parliament was meant to include the estate of a person who was domiciled in *England*, a subject of this country, an Englishman, whose executors are living in this country. It can never be doubted that this Act was meant to make his estate subject to the charge, and that persons claiming under him, and receiving part of that estate, were liable to contribute to the revenues of this country by force of the Act of Parliament.

"Upon what grounds was it contended that this estate is not liable? Because the duties on probates and administrations would not have *extended* to this particular fund. This argument does not appear to me to make any difference in this case. By the Act of Parliament, the duty upon the probate is only imposed in respect of that fund, which the executor is to obtain in a particular province of this country by force of that probate. If there be a personal estate in the province of *York* and *Canterbury*, and a probate be taken in the province of *York*, the duty is paid upon the property in that province only, and it is not paid upon the other property until a probate be taken in the province of *Canterbury*.

"This is made apparent by the very terms of the Act, for it says: 'Where the estate and the effects for, or in respect of which such probate, letters of administration, or confirmation respectively, shall be granted, or expeded,—' *evidently*

(a) Logan *v.* Fairlie, 2 Sim. & Stuart, 284.

confining the charge upon the probate to those particular estates to be recovered by force of that administration. But when it speaks of the legacy duty, it is charged upon the amount of the estate itself, to be handed over upon the receipt, which the executor, to save himself from the penalty, ought to take before he pays the money.

"I cannot doubt, therefore, in this particular case, that the legacy duty is chargeable upon this property, because, in point of fact, it is under the administration of the executor; and though he is not bound, in order to get at it, to take out a probate or administration, still it is by force of the interest he takes under his testator's will, that it is disposed of,—he hands it over to the legatee, whether he is pecuniary legatee, or residuary legatee: it is by force of his act, it is transferred to such legatee; and it is the case that it was the intention of this act to fix it with the duty. I am of opinion, therefore, that there can be no doubt that this property is liable to the legacy duty."

Bayley, B.—"From the first moment I knew any thing of the state of facts in this case, it appeared to me to be a case perfectly free from doubt. It is a case of a will made by a British subject domiciled in *England,* and it is to be executed by an English executor, and to operate upon that which, throughout, in my opinion, is English personal property. It was pressed by the counsel, that the property was to be considered as being in the country in which it was real property. There is nothing in any part of the affidavit to shew that such was the character that properly belonged to it, but some reliance was placed upon a supposed analogy between the case of this property, and property in English funds, which, in the creation of those funds, might originally be considered as being real property, and descendible to the heir, but which, very soon afterwards, was considered personal property, and not descendible to the

heir, but to go as personal property would go. Does it follow, because the English funds were originally considered as real property, that the French, and American, and Russian funds were also so considered? It would be for the party who insists that this is the character which belongs to the property in question, and who ought to know the character of the property of which he is the owner, to show that such was the character of this property. But the circumstances mentioned on behalf of the Crown, namely, that the name of the executor was suffered to be introduced in the books, that the executor was suffered to deal with the funds, and that his directions were followed as to the dividends, satisfy my mind that this is to be considered as personal property in the place where it is payable; and that, consequently, we are not warranted in considering this as being real estate. If it be not real estate, it is personal estate; and if it be personal estate, it is not in any respect to be considered different from personal property abiding in this country? There is no doubt but that the amount, when you are receiving the dividends, will be payable in the place in which, by the constitution of these funds, the dividends are payable, and that will be *America, Paris,* or *Petersburgh.* But you are not to look at the place where the thing is payable, or transferable; but when once you have ascertained that it is personal estate, then you are to ascertain what are the rules of law with regard to personal estate, being at the time not locally in this kingdom, but being at the time locally situated abroad.

"Now what is the rule with respect to it? It is clear, from the authority of Bruce *v.* Bruce (*a*), and the case of Somerville *v.* Somerville,(*b*) that the rule is, that personal property follows the person, and it is not in any respect to

(*a*) 2 Bos. & Pul. (229); 6 Bro. P. C. 566. (*b*) 5 Ves. 787.

be regulated by the *situs;* and if in any instances the *situs* have been adopted, as the rule by which the property is to be governed, and the *lex loci rei sitæ* resorted to, it has been improperly done. Wherever the domicile of the proprietor is, there the property is to be considered as situated; and in the case of Somerville *v.* Somerville, which was a case in which there was stock in the funds of this country, which were at least as far local as any of the stocks mentioned in this case are local, there was a question whether the succession to that property should be regulated by the *English* or the *Scotch* rules of succession, the Master of the Rolls was of opinion that the proper domicile of the party was in *Scotland.* And having ascertained that the conclusion which he drew was, that the property in the *English* funds was to be regulated by the Scotch mode of succession, and if the executor had, as he no doubt would have, the power of reducing the property into his own possession, and putting the amount into his own pocket, it would be distributed by the law of the country in which the party was domiciled. Personal property is always liable to be transferred, wherever it may happen to be, by the act of the party to whom that property belongs; and there are authorities that ascertain this point, which bears by analogy on this case, namely, that if a trader in England become bankrupt, having that which is personal property, debts, or other personal property due to him abroad, the assignment under the commission of bankruptcy operates upon the property, and effectually transfers it, at least as against all those who owe obedience to these bankrupt laws, the subjects of this country. In this case, therefore, it appears to be clear, that this is to be considered as being *English* personal property. Why, then, if it is *English* personal property reducible by an *English* executor into possession, so that he may have it in its full value in this country, is not the legacy duty to

attach upon it? It was put in a strong way to illustrate the argument by the Attorney-General, that if there had been a deficiency of assets in this country to meet the debts of the testator, it would have have been the duty of the executor to have sold this property, and to have brought it bodily into this country, as that which was to be resorted to; and that it would have been a *devastavit* if he had not adopted that plan if there were debts.

"Then, if it has the character of *English* property, can there be any doubt but that it falls within this rule that attaches upon all legacies and all successions to personal or moveable estate? The rule, as to probates, has been pressed upon our consideration, and the difference between those things, *bona notabilia*, and those things not *bona notabilia*. The question as to *bonum notabile* is essential only to ascertain the *situs* of the property, and to ascertain, with regard to the probate, out of what limits the power that is to clothe the executor with the means of acting upon it, shall issue, and it is *bonum notabile* in one place or another according to its *situs*. But *Bruce* v. *Bruce* decides that the *situs* determines nothing in a case like the present, for the executor has the power of removing the property from its *situs*, and getting it into his own country. Now the probate duty is only with reference to the *situs* of the property within the limit of the probate. In the course of the argument, the case was put, of a *York* administration and a *Canterbury* administration. The duty, with reference to those, will be regulated by the amount of property in each of those dioceses; but if there is other property not in those dioceses but property abroad, with reference to which there may be no probate essential, or with respect to which the only probate will be the probate belonging to that country, that will not be taken into the amount of duty paid either upon the *Canterbury* administration, or the *York* administration.

The cases referred to, Logan *v.* Fairlie, and Hay *v.* Fairlie,[a] do not seem to me to bear upon the present question, because there the party was not domiciled within the limits within which the duties referred to by this Act of Parliament attach. In each of those cases the party was resident in *India*. It is quite clear, when you come to look at the Legacy Acts that they are co-extensive with the limits of this kingdom, and this kingdom only, and do not extend to the territorial *possessions of the Crown in India*. Therefore, in neither of those cases did the question arise whether the legacy duty was payable upon the whole of the property the testator left.

"It appears to me there is a plain distinction between those cases and the present case, because those were cases where the property was domiciled in *India*, not being domiciled in the limits within which this Act applies; but the present is a case of a man having an English domicile, whose property of this description is considered English personal property."

Yarrow, B., and Vaughan, B., concurred.

Rule absolute.[b]

(*a*) 1 Russ. 117. Lord Gifford, M. R.

(*b*) As to the distinction between the grant of probate regulated by the *situs* of the *bona notabilia*, and the distinction of the property which depends upon the domicile of the deceased, see 1 Williams Saund. 275, note (*a*) by Patteson & Williams.

IN RE BRUCE.

Property in this country belonging to a foreigner who dies abroad, and appoints an ENGLISH executor, and bequeathed to ENGLISH legatees, is not liable to Legacy Duty.

A testator, an American by birth, some time in the year 1764, and whilst a minor, went to *Scotland* for the purpose of being educated in that country: as soon as he had attained his majority, in 1788, he sailed to *India*, describing himself in the ship's book as an *American*, and as such he remained in *India* thirty years; and at the expiration of this period, he returned to *Europe*, leaving the bulk of his property in *Bengal*, and afterwards, having revisited *America*, made a tour through England, Scotland, and the Continent, and again returned to *America*, where he entered into agricultural pursuits, and continued to draw his property to that country until his death at *New York*, in 1826. Held that he was an *American* citizen.

2 Crompton & Jervis, 436.

The common rule having been obtained by *Amos*, under the statute of 42nd Geo. III., cap. 99, sec. 2, calling upon the executors of C. K. Bruce, to account and pay the legacy duty, cause was shewn upon an affidavit, which disclosed the following facts :—

That the father of the testator *Bruce* was born in *Scotland*, and went in his youth to *North America*, where he fixed his permanent residence, and married an *American* woman. The testator Bruce was the issue of that marriage, and was born in the state of *Maryland*, in or about the year 1764; and the father and mother of the testator continued to reside in *Maryland* to the time of their respective deaths. The

testator was sent to Scotland for his education, when a boy, and much under the age of twenty-one years, and was educated there under the care of his paternal grandmother. In or about the year 1788, the testator sailed to the *East Indies*, and was stated in the ship's books to be an American, and continued in *India* until in or about the year 1818, during which period he was engaged in mercantile pursuits there on his own account, but had not, and did not hold, during his residence in India, any place or appointment under his *Britannic* Majesty, or the *East India* Company. About the year 1818, the testator, having acquired a considerable fortune, came to *Europe*, leaving the greater part of his property so acquired in *Bengal*, and, soon after his return to Europe, proceeded to the *United States of America*, to see his family, and make arrangements in respect to certain property in that country left him by his father. He came from *America* to this country with the intention of visiting several places in *Scotland* and *England*, and on the Continent of *Europe*, and for the purpose of directing the removal of part of his property to *America:* and on his final return to *America*, in or about the year 1824, he commenced drawing his property to the *United States*, and continued doing so till the time of his death, which took place on the 23rd of December, 1826, at *New York*, where he resided, having for some time previously embarked in agricultural pursuits. The testator, in his will, dated the 19th day of December, 1826, describes himself as Charles Key *Bruce*, late of *Calcutta*, now of *Richmond*, county and state of *New York;* and always considered himself to be an *American*, and not a *British* subject, and was domiciled in *America*, at the date of his will and death. By his will he bequeathed legacies to a considerable amount. Some of the legatees resided, and now reside, in *Great Britain;* being the legacies, in respect of which, the sum of £33,975 2*s*. 2*d*.

had been apportioned as above mentioned, and including legacies to the executors, and also to persons who resided, and now reside, in *India* and *America*; and directed the residue of his estate to be divided among the said legatees in the same proportions as their original shares, and appointed, as his executors, *Bailderson, Mackillop,* and *Shoolbred,* persons resident in *England.* The testator, at the time of his decease, had standing in his name, in the *British* funds, £1,111. 4*s.* 2*d.*, £3 per cent. Consols; £500, £3. 10*s.* per cent. Reduced Annuities, and £52 Long Annuities. The will was proved by the executors in the Prerogative Court of *Canterbury,* and probate duty paid to cover effects not exceeding £10,000 in that province. A suit was instituted by certain of the legatees resident in *England* and *Scotland,* for an account and administration of the testator's estate, and a decree was pronounced on the hearing of the cause. Pursuant to the said decree, the Master, by his report, bearing date the 31st of July, 1827, certified that he had approved of certain persons to take out administration with the will annexed, in *India,* in 1827; also certified that he had approved of certain persons to take administration with the will annexed to the testator's effects in *North America;* and also to prove the testator's will, or to obtain letters of administration of the effects of the testator in *North America.* The only property of the testator in *Great Britain* consisted of the said £1,111. 4*s.* 2*d.*, £3 per cent. Consols; £500, £3. 10*s.* per cent. Reduced Annuities, and £52 Long Annuities, standing in his name in the books of the Governor and Company of the Bank of *England;* and of a sum of £6. 11*s.* 9*d.*, being the balance of an account with Messrs. *Sir William Curtis & Co.,* and of several Bills of Exchange remitted from *India,* amounting to £6,282. 3*s.* The attornies appointed by the executors in the *East Indies,* under the probate of the testator's will granted there, got in effects to

the amount of £30,000, or thereabouts, which arose from the sale of personal property in that country, and which was remitted to the executors in *England,* and by them paid into the Bank, with the privity of the Accountant-General of the Court of *Chancery,* to the credit of the cause. The testator's property in *America* in lands, *American* stock, and debts owing to him, amounted in the whole to about £23,000, no part of which had been remitted by the attornies there. The administrators in the *East Indies* and in *America,* paid the several legacies bequeathed by the testator to persons resident in those countries; and the funds possessed by the testator in *England,* and the monies remitted from the *East Indies,* having been transferred and paid to the Accountant-General of the Court of Chancery, the same produced the sum of £33,975. 2*s.* 2*d.*, apportioned amongst the several legatees in *England* and *Scotland,* as above mentioned.

Bayley, B.—"This cause was argued before the Lord Chief Baron, who is necessarily absent from the Court, but concurs in the judgment I am now about to deliver.

"The testator's father was a *Scotchman* by birth; he went when young to *America,* fixed his residence there, he married there, and he and his wife lived there, till he and she died. He was born in *Maryland,* in the year 1764, he was sent, when he was a young man under twenty-one, to *Scotland,* and in 1788 he sailed to the *East Indies,* and continued there till 1818, a period of about thirty-years. In 1788, when he went out, he was entered in the ship's books as an *American.* In 1818, he returned to *Europe,* leaving the greater part of his property he had acquired there behind him in *Bengal;* and then he went to *America* to see his family, and to see some property there which his father had left him. He afterwards left *America,* to visit different parts of *England, Scotland,* and the Continent, and to make arrangements to remove part of his property to

America, and on his final return, he commenced drawing his property to the *United States,* and continued to do so till the day of his death, which was the 23rd of *December,* 1826; on which day he died at his residence in *New York.*

"He describes himself in his will as "late of *Calcutta,* and now of *Richmond,* in the county and state of *New York.*"

"By his will, he gave legacies to persons then resident, some in *Great Britain,* some in *India,* and some in *America.* He left, personalty, in England, under £10,000; and he left legacies to *English* residents to a considerable amount, probably an amount exceeding £30,000, because there is now appropriated in *Chancery* a fund for the payment of the legatees to the amount of £33,975. The probate duty has been paid, and a bill has been filed by some of the *British* legatees for an account; £33,975 has been apportioned between the *British* legatees; and the question is, whether the legacy duty is payable upon that sum: and upon consideration we are all of opinion that the legacy duty is *not* payable.

"Upon the facts stated, it seems to us to be clear that he was, at the time of his death, a citizen of the *United States,* and not a *British* subject, and his personalty, wherever situated, was to be deemed not *British,* but *American* property; and neither himself nor his property were liable, generally, to be bound by *British* statutes, or to contribute to the support of the *British* Government. He was born, indeed, in what, at the time of his birth, was within the *British* dominions; but upon the treaty between this country and the *United States,* he had the option of continuing a *British* subject, if he should elect *Great Britain* as his country, or of ceasing to be a *British* subject, and becoming to all intents and purposes an *American;* and it seems to us that he had made his election for the latter, in 1788, which was after the period at which the treaty between this country and

the *United States* took place,—he passed as an *American*—he was so entered in the ship's book—he described himself as *American* in his will, and he is resident in *America* when he dies. He was not, therefore, liable, nor was his personal property, as it seems to us, liable to the statute of this realm. The Acts of Parliament were not binding upon him, and he had a right to transmit the personal property which he had here, to whom he would, free from every *British* burden. Had he made foreign executors, and given no legacies except to foreigners, there can be no doubt but that the executor would have been entitled to have removed the whole of the property from this kingdom, and to have paid the foreign legatees in full, without deduction, subject to no burden in this country, except the single burden of the probate duty, which would be imposed upon that portion of his property which he suffered to be in this kingdom. If his executors had been foreigners, or if the legatees had been foreigners, then they would not have been liable to the legacy duty: how can it make any difference that the *executor is a subject of this realm?* he is merely the medium by which the property belonging to the testator is to be distributed. Can it make any difference that the legatee is a subject of this kingdom? If the legatee had been a foreigner, he would have got his £100 per cent.; and it is a great discouragement against a testator leaving his property to a *British* subject that, instead of leaving him £100 *per cent.*, he can only leave him £90 *per cent.*, because the residue of the property will be given to persons who constitute the state of this kingdom.

"Therefore, upon the principle that he is not a *British* subject, not bound by the laws of this kingdom, and that he is entitled to consider his property, though locally here, as not being *British* property, but *American* property, we are all of opinion, that the legacy duty in this case is not payable; and the circumstances I have mentioned plainly distinguish this

case from the authorities of the Attorney-General *v.* Cockerell, and the Attorney-General *v.* Beatson, and Logan *v.* Fairlie; for, without expressing any opinion with reference to the two cases lately decided whether the legacy duty would or would not be payable where the testator was a *British* subject not resident in *Great Britain,* when he made his will, and in respect of property which he happened to have in this kingdom at the time when he made his will, without, I say, expressing any opinion upon that question, we are of opinion that the case of the Attorney-General *v.* Cockerell, and the Attorney-General *v.* Beatson, and Logan *v.* Fairlie, are distinguishable in this respect: that there the property was the property of *British* subjects, and the testators in each of those cases were residents in *India,* and originally *British* born. They were, therefore, liable to be bound by all the Acts of Parliament sufficiently comprehensive to include them, made by the British Parliament, and that, as it seems to us, is not the case with the testator. The legacy duty is in substance a burthen upon the testator's property, whereas, if he were to be bound by the laws of this country, every £100 which he proposed to give, would pass into the hands of his legatee, whilst a decision that his property was liable to the burdens of this kingdom, would prevent any English legatee from taking more than £90. That, as it appears to us, is not the principle, and would be inconsistent with the principle upon which we think these Acts of Parliament ought to be construed, we are therefore of opinion, that the legacy duty in this case is not payable, and that the rule must be

Discharged."

THE above two cases printed *in extenso*, have been selected as leading authorities on the subject of the attachment of legacy duty, since the principle which they must he considered as having established, has governed all snbsequent cases of the same nature. RE EWIN, as we have seen, decided that the personal property of a testator dying domiciled in this country, was liable to the payment of the legacy duty, wherever that personal property might happen to be, while in RE BRUCE, the converse of this proposition was held, namely, that the personal property of a testator, domiciled, and dying abroad, in a foreign country, would be exempt from the hefore-mentioned duty; and in so laying down as law these principles, they impliedly overruled the cases of THE ATTORNEY-GENERAL *v.* COCKERELL, decided in 1814, and reported in 1 Price, 165. THE ATTORNEY-GENERAL *v.* BEATSON, decided in 1819, and reported in 7 Price, 560, and LOGAN *v.* FAIRLIE, decided in 1825, and reported in 2 Sim. & Stu. 284.

Before considering the numerous cases, with all the various circumstances which attached to them, subsequent to RE EWIN and RE BRUCE, it has been thought best briefly to review those which have been mentioned as anterior to the two leading decisions, whilst at the same time it is submitted that the judges who decided them, in their anxiety to sustain the fiscal revenue of the crown, overlooked the true principles which their successors have since stated with such clearness, and which now appear to be so founded on simple common sense, that it is somewhat difficult to understand by what exercise of learned subtlety, any other principles conld have been laid down, or any other conclusions drawn.

In the case of The ATTORNEY-GENERAL *v.* COCKERELL, 1 Price, 165, an information had been filed against the defendant in the Court of Exchequer, at the instance of the Commissioners of Stamps, for the purpose of taking the opinion of the Court on a question arising on the construction of the Legacy Duty Acts. The information stated that the defendant was indebted to the Crown in the sum of £5,466 4*s.* 8*d.*, he having been acting executor of Alexander Robertson, and

having retained the residue of his testator's estate for the benefit of certain parties, strangers in blood, which residue was chargeable with certain duties. A case was stated for the opinion of the Court, by which the following facts appeared:—That *Alexander Robertson* was resident at Cawnpore, in the province of *Oude*, in the *East Indies*, and died there, having made his will, by which he gave all his real and personal estate to trustees in trust (after making a provision for the mother of his illegitimate children) for such children, and appointed the defendant and others his executors; all his personal property was in India, the will was proved in India, and the executor brought over and had remitted to him the procceds arising from the sale of such property; it was also stated that in consequence of the death in England of one executor previous to the children attaining the age of 21 years, the other executor took out probate of the will of Alexander Robertson in England, in order to obtain the money due to the estate of the latter from the executors of the deceased executor; and the question was, whether such estate was liable to the legacy duty. There was no question raised as to whether or not the estate was to be considered personal: that it was so, was admitted on both sides; and Chief Baron Thompson, in delivering judgment, distinctly declared that the fact of where the property was situated, or where the will was proved was immaterial, as also where the parties *lived* or *died*, but decided the question on the ground that the duty clearly attached *on the payment of the legacies*. The ATTORNEY-GENERAL *v.* BEATSON, 7 Price, 560, was very similar in its facts to the case just mentioned, with the exception that the information was filed against the executors of the residuary legatee,—a fact of no importance to the present inquiry. Administration with the will annexed of the original testator *William Hope, of Madras, in the East Indies, a native of Scotland*, was granted to the residuary legatee by the Prerogative Court of the Archbishop of Canterbury; and the Court were of opinion that J. Murray, the residuary legatee, having taken out administration in England, it was an administration in fact and in law, and therefore the testator's personal estate, having been applied in

England, the whole was liable to legacy duty.

These two decisions are evidently founded on the circumstance of the wills having been proved and administered in England; and the money in the hands of the executors or administrators being assets for payment of debts and legacies in this country, the Court apparently considering that it was indispensable for the legatee to give a receipt, requiring a particular stamp, which could not be obtained except by paying the duty, and the executor having proved the will in Great Britain, where the legatees resided, it was apparently considered absolutely incumbent on the executor to take receipts for his discharge, although in argument it was strongly urged that the legacy duty was *not* payable on the *receipt*, but on the *legacy itself*, the simple question being, whether or not the particular legacies were legacies within the scope and meaning of the 36th Geo. III., cap. 52(a); and in the last of these cases, *i. e.* The Attorney-General *v.* Beatson, the question of *domicile* was first raised in argument by *Mr. Campbell*, (the present *Lord Chief Justice of England*,) who was then at the bar, counsel for the defendant, although it did not apparently form any part of the case submitted to the Court.

In the case of Logan *v.* Fairlie, 2 Sim. & Stu., 284, though the property was Indian, yet Sir John Leach held the duty payable because the agent in this country of the executor in India had authority only to pay the legacy to the legatee first entitled, but had no authority, as he supposed, to pay it to those who were to take in the event of the first legatee being dead; therefore the fund being unappropriated in India, administration was necessary, and so it was decided in favour of the Crown. This doctrine of Sir John Leach was, however, repudiated by Lord Cottenham in 1835, on the petition of one of the legatees coming of age, praying that he might be exempt from legacy duty; and the decision of 1825 was expressly overruled, and is reported in 1 Myl. & Craig, 59.

To the principles which govern the law respecting domicile, some portion of this Treatise has been

(a) Previous to this Act, the duty attached on the instrument itself, but by this Act, the legacy became the guide, although a receipt was still necessary.

devoted (*see* p. 29), so that here it will be only necessary to notice a strong argument against the attachment of legacy duty on legacies left by persons domiciled abroad; indeed it is impossible to imagine that the legislature in imposing this tax could have meant to extend it to other countries, where it had no jurisdiction; for a testator living and dying in *India* was as little subject to British legislation as if he had lived and died in France; the Acts of Parliament not extending to the British colonies unless expressly named. At this period, there was such a confliction of opinions on the construction of Legacy Acts, that facts relating to the domicile, the place of a testator's making his will, or the situation of his personal property at the time of his decease, were looked upon as unimportant, it being held that, in all instances, the legatees' receipt for payment was the guide by which the duty attached; indeed it seems clear that so little was the question of domicile considered in determining the construction to be put upon the Legacy Acts, that it was even doubted whether a native of this country could become domiciled in another; and Mr. Baron Richards, in the case of ATTORNEY-GENERAL *v.* COCKERELL, is reported to have solemnly inquired whether "It is quite clear that a British subject can be domiciled in India?"

The grounds therefore upon which these cases were decided, would seem to have been overruled ever since the year 1830, by RE EWEN, and 1832, by RE BRUCE, (p. 22), in the latter of which cases Bailey, B., says, without expressing any opinion with reference to the above cases of the ATTORNEY-GENERAL *v.* COCKERELL, and the ATTORNEY-GENERAL *v.* BEATSON, or LOGAN *v.* FAIRLIE, "If the executors had been foreigners, or if the legatees had been foreigners, they would not have been liable to the legacy duty, and how can it make any difference that the executor is a subject of the realm? He is merely the medium by which the property belonging to the testator is to be distributed: can it make any difference that the legatee is a subject of this kingdom?"

It is difficult to conceive how the learned judges could have continued for so long a period to attach so much importance to either the acts of an executor

proving the will, or administering the property in this country, or in taking a receipt from the legatee for such legacy, so as to render a testator's personal estate subject to the legacy duty; that is, subsequently to the repeal of the 20th Geo. III., cap. 28; 23rd Geo. III., cap. 58; 29th Geo. III., cap. 51. The Legacy Act of 36th Geo. III., cap. 52, by which the former ones were repealed, expressly attaches the legacy duty on the corpus of the sum bequeathed, and not upon the instrument, which a careful pernsal of all the Legacy Acts will convince the reader to be the case. It is true that the 27th section of the 36th Geo. III., provides that *no legacy liable to duty* shall be paid without a receipt, &c., which must have meant merely to serve as a criterion in assessing the rate of duty upon such legacy as was liable to be charged on the bequest according to the degree of consanguinity whenever the bequests come within the statute; otherwise, in a case where it might become necessary for either a husband or wife to give a receipt for a legacy, though they are expressly exempted by the statute, yet, if a receipt was the true test by which the legacy duty was to attach, those parties would by parity of reasoning come within the statute. Before the 36th Geo. III., cap. 52, the legacy duty was certainly an *ad valorem* duty attaching on the instrument itself, so that if no receipt was given, no duty was payable, and the executor was not at that time compelled to demand, or the legatee to give one. The reason for the 36th Geo. III., cap. 52 still requiring a receipt (though the legacy duty, as before stated, attaches on the legacy itself, and not upon the receipt, being merely the instrument by which the payment of such legacy is acknowledged) might have been for the purpose of protecting the revenue, by compelling the executor to demand, and the legatee to give a receipt, as in ordinary cases, for which receipts are in general given, and this, notwithstanding the legacy did not come within the 36th Geo. III., cap. 52, because, otherwise, if, from circumstances, the duty did not attach upon the legacy, and no receipt was given to the executor administering the personal property in this country, then the intention of the legislature would, by that omission, be

defeated, so far as losing the duty on payments made in this country to a legatee who was not subject to legacy duty is concerned; and as the legislature imposed a stamp duty on a receipt in almost all other transactions for which one is given, the framers of the Act might have intended this when it fixed the legacy duty on the fund itself, but still required a receipt as in the former Acts. Whatever differences of opinion, and doubts might have existed on the true construction of the Legacy Acts, particularly on the effect of an executor proving or administering the property of a testator domiciled abroad, or taking a *receipt* from the legatee, down to the decision of the Attorney-General *v.* Beatson, it would seem clear that the question was set at rest in RE EWIN'S case, which, as we have seen, decided in express terms, first, that the Act was confined to Great Britain, and did not extend to the territorial possessions of the Crown in India; secondly, that personal property follows the person, and is not in any respect to be regulated by the *situs;* and if in any instance the *situs* has been adopted as the rule by which the property is to be governed, and the *lex loci rei sitæ* resorted to, it has been improperly adopted. So that it would follow, that, where the domicile of the proprietor is, there the property is to be considered as located. And in RE BRUCE, it was also clearly decided, that the fact of either proving or administering the property in this country did not subject it to the payment of legacy duty, when it would not be otherwise liable. Previous, however, to entering on the consideration of any of the subsequent cases, which were decided on the authority of RE EWIN and RE BRUCE, and which may be fairly held as expository of the law as interpreted in those two cases, it is desirable to give some clear and definite notion of the law affecting "Domicile," since all those cases have been generally decided in respect of property belonging to persons dying beyond the jurisdiction of the ecclesiastical courts of this kingdom.

The law upon this important subject has been for so long unsettled, and the authorities so varied and numerous, that any attempt to detail the course of a lengthy although intermittent judicial investigation would be

almost endless and entirely foreign to the object of this work. It has therefore been the author's endeavour to confine himself strictly to the different legal interpretations which have been given to the word DOMICILE in the abstract; as in reference to cases arising out of the Legacy Duty Acts, and he has sought by reference to the latest authorities on the subject, to lay before the profession and the public the true and correct meaning of this word in its application to, and connection with those Acts; and in so doing, he does not scruple to admit that he has derived the greatest assistance from, and at the same time made considerable use of, Mr. Justice Williams's work on the "Law of Executors and Administrators," and Mr. Justice Story's "Conflict of Laws."

In the popular sense, a man's *domicile* is the place where he habitually resides, in other words, his home [*see* below note (a)]. But the law has attached to it a more strict and confined sense, declaring that there shall be not only a residence, but an intention to remain resident; and if from circumstances such residence be left, yet if the party have the intention to return, it shall still for all legal purposes be deemed the place of his domicile. Mr. Justice Story, who, in his valuable work on the "Conflict of Laws," has collected all the learning of ancient and modern writers on this subject, says, (b) "that the mere act of inhabitancy in a place does not make such place a domicile, except it is coupled with the *animus manendi*, and that a temporary absence from home would not be a change of domicile if there is an *animus revertendi;* there must, therefore, be a substantive fact, and an intention to create that fact, *cum neque animus sine facto, nec factum sine animo ad id sufficiat,* (c) the one

(a) In Durand's Dictionaire de Droit Canonique, vol. 2, p. 381., is the following explanation.

"Domicile est le lieu ou l'on fait sa residence: les marques d'un veritable domicile sont exprimées ainsi par les loix,— ubi quisquam uxorem, liberos, tabulas, instrumentum rei domesticæ habeat, ibi domicilium constituisse existimandus sit. Quamobrem qui figendi ejus animum non habent, sed usûs, necessitatis, aut negotiationis causâ aliundè sint protinùs à negotiis discessuri, domicilium nullo temporis spatio constituent. Cùm neque animus sine facto nec factum sine animo, ad id sufficiat,"—and it continues "ce n'est pas assez de demeurer sur une paroisse d'une maniere indeterminee, mais il faut y etre avec intention d'y—demeurer ou toujours, ou le temps marqué par les lois, du pays."

(b) Page 47.

(c) Durand's Dic. ante, note (a)

being the residence, the other, the intent to remain resident.

Now in all cases where the application of a word having a strict legal signification, depends upon such evidence as that of *intention*,—there will always be a great variety of cases in which the definition followed may be apparently at variance with that laid down in the abstract; but it is submitted that upon a careful investigation, it will generally be found that the supposed variances exist not in the meaning given to the word, but rather in the application of the evidence (varied as necessarily all proof of intention must be) to meet the definition which is on all hands admitted to be correct; it becomes, therefore, a task of the greatest difficulty, in deciding cases upon facts, to adhere strictly to any abstract definition, by that it is meant that it is in every case almost impossible to say such and such facts make up sufficient to support the meaning given to what may be very properly called a *vocabulum artis*, or word of art, when, perhaps, there appear other facts which go towards extending the strict and confined meaning, and which to some minds may have the effect of entirely controlling or altering it. These remarks are introduced with a view to explain many of the apparent inconsistencies which appear in the judgments of the many learned personages on this subject.

It is now established beyond all doubt, that the general (*a*) or special law of the country in which the domicile of a party dying testate (or intestate) may happen to be, is to regulate the succession to, or distribution of the personal estate of such party;(*b*) and this rule may be considered by analogy as founded on the principle which has been laid down with respect to contracts, namely, that they are to be expounded according to the *lex loci*, or law of the place in which they are made; in the former

(*a*) The words "general or special" are here made use of by way of explanation, inasmuch as in some countries the wills of foreigners, as well as natives, are subject either to the general law, or to some particular regulations on the subject; such, for instance, as that wills of foreigners *shall* be attested, administered, or interpreted according to the law of their respective countries, &c. See also Williams on Exors., p. 306, 4th edit.

(*b*) On Price *v.* Dewhurst, 8. Sim. 279—s. c. 4 My. & Cr. c. 76—82; Yates *v.* Thompson, 3 Cl. & Fin. 544. Anstruthur *v.* Chalmer, 2. Sim. 1.

case the *jus domicilii* is to govern, in the latter, the *lex loci contractus*.

That the word "Domicile" must here be taken in its strict legal sense, is quite clear, since in the *Duchess of Kingston's case*, referred to in Curling *v.* Thornton,(*a*) it appears that the will was admitted to proof in England, although she resided in Paris, under letters patent, registered in the Parliament of Paris, on the ground that there was no evidence of an abandonment of her English domicile, or any of sufficient weight to justify the presumption that her residence in Paris was of the nature of a new domicile.

It will be found that there are generally admitted to be three methods of acquiring *Domicile:* in the language of Mr. Justice Story, in the work before referred to, there is a "*domicile by birth,*" a "*domicile by choice,*" and a "*domicile by act and operation of law;*" the first is the ordinary case of the place of birth, and which, with some limitation, which will be observed on presently, is that which is usually termed the *domicilium originis;* the second, is that which is voluntarily expired by a party *propio marte;* and the last is consequential, as that of the wife's, arising from marriage.

Bearing then in mind the principle that all personalty is in the eye of the law, considered as part and parcel of the person, having no *situs* or separate local habitation distinct from that of the person,(*b*) and is not in any case regulated by the *lex loci rei sitæ*, and that the distribution of all personal estate is, as has been before said, regulated by the law of the country in which the party is domiciled, and that it is quite immaterial where he was born, where his property is situated, or where he died, so long as any or either of these(*c*) shall not be

(*a*) 2 Addam's Ecc. Rep. 17.

(*b*) In Re Ewin, 1 Cr. & Jir., 156, and Doe *v.* Vardille, 5. B. & C. 438 *et seq.* Mobilia sequunter personam et ejus ossibus adhærunt. See Harvey *v.* Richards 1. Mason R. 412. M. J. Bayley in Re Ewin, 1 Cr. & J. 156. In this case it was decided that legacies left by a person having stock in foreign funds, but domiciled in England, was liable to legacy duty under 36 Geo. III. cap. 52. And per Abbott C. J. in Doe d. Birtwhirlle *v.* Vardille, 5. B. & C. 438. 451. 452.

(*c*) This Rule is laid down by Lord Thurlow in Brucc *v.* Bruce, and Lord Longborough in Ommaney *v.* Bingham, and recognised by Lord Alvanley in

identical with his domicile. It is easy to understand the importance attaching to an accurate knowledge of what that same law considers the habitation, *i. e.* the domicile of the person. Upon a question, therefore, arising, as to whether certain personal property is liable or not to the duties imposed by the Legacy Duty Act, the first fact to be ascertained is, the domicile of the testator, and this can only be ascertained by inquiring into the nature and character of his *residence*, which, *prima facié*, is his domicile until the contrary be shewn.(*a*)

The following remarks on this subject are intended to aid this inquiry, and may be taken as the results of a careful examination of reported cases.

By Birth. A party has a domicile, and it matters not whether his or her parents are foreigners, so long as they are residents in England, with an intention to remain; for such persons are looked upon by the law as inhabitants, and their children would be considered *indigenæ*, subjects born, in other words, citizens of the country in which they are born;(*b*) consequently, their domicile becomes the domicile of their children,(*c*) until such children attain the age of 21 years, *i. e.*, become *sui juris*, when being considered as capable of exercising a will upon the subject, they are at liberty to change and adopt any other domicile they please.(*d*) In the case of foundlings, when their parents and place of birth are unknown, it is presumed that their domicile would be considered the place where they were found. Birth-domicile must, however, be taken with some slight limitation; for instance, the parents may have a domicile distinct from the birth-place of their child, as, if the child be born while the parents are, *in itinere*, or sojourning temporarily with an intention to return to their original domicile, then the child's domicile is *not* the place of its birth, but is iden-

Somerville *v.* Somerville, 5 Ves. P. 787.

(*a*) Bempde *v.* Johnson, 3 Ves. 201, 202, by Lord Loughborough; Bruce *v.* Bruce, 2 Bos. & Pull, 228, *note id.*, 230; Stanley *v.* Bernes, 3 Hagg. Ecc. R. 374.

(*b*) Coke Litt. by Thomas, p. 90, and 2 Steph's Black. p. 427.

(*c*) 2 Hagg. Ecc. Rep., 405.

(*d*) Per Master of the Rolls in Somerville *v.* Somerville, 5 Ves. 787, and see also Pottinger *v.* Wightman, 3 Mer. 67.

tical with that of its parents.(a) Again, if the child be illegitimate, the domicile of the mother prevails, and the same rule prevails in case of the father dying, so long as the mother remains a widow and has charge of the infant;(b) but this proceeds from the fact that a widow retains her husband's domicile until she changes it by her own will, or by marrying again; and it is very questionable whether her children would not, in the latter event, retain their deceased father's domicile; so that in fact, it is only when the domicile of the parents happens to be also the birth-place of the child, that this first division, which Mr. Justice Story has created, exists, and that the mere place of birth of itself never does constitute a domicile, or, in truth, in any degree, affect it.(c)

By Choice. We have seen(d) that a domicile, other than the *domicilium originis*, may be obtained by all persons of full age, *sui juris*, and to this general and now universally admitted proposition there are no limitations of any importance, except the two which are now going to be mentioned: first, there must be a total and complete abandonment of the former domicile, and the adopted one must be the result of a voluntary act. Sir John Nicholl, in the case of *Curling* v. *Thornton*,(e) lays down the former of these rules, and the latter requires no distinct authority, since it must be recognised in the principle, viz., that intention *animus* is one of the necessary ingredients, as it were, of domicile; and however much a superior power may force the body, yet it is impotent on the mind.

It is true that the same learned judge above referred to, doubted whether a British subject was entitled so far, *exuere patriam*, as to abandon his British domicile, (f) but the case of Stanley *v.* Bernes,(g) virtually resolved these

(a) Somerville *v.* Somerville, 5 Ves. 750; 787.

(b) See Johnstone *v.* Beattie, 10; Cl. & Fin. 66, 138, per Lyndhurst C. and Lord Campbell; also Story's Conflict of Laws, sec. 506., *note* 1., & Pottinger *v.* Wightman, 3 Merivale, 67.

(c) See last cited case, p. 786, per Master of the Rolls.

(d) Page 33, *ante*.

(e) 2 Addams' Ecc. Rep., 17.

(f) It is very possible that Sir John Nicholl had in his mind the law affecting what may be termed the *domicile of allegiance*, under which it will be found that a British subject is unable by his own voluntary will and pleasure to shake off his natural allegiance.

(g) 3 Hagg. 374; 1 Hale, P. C. 68.

doubts by deciding that the will of a British subject, domiciled in Portugal, but not executed in conformity with the laws of that country, was not entitled to probate in England, thus virtually admitting that the principle of domicile was, in its very nature, dependant on the will of an individual having capacity, (*i. e.* being *sui juris*) and independent of any duty or obligation which it might be supposed an individual owed to his country, and which the laws of such country had recognised or sanctioned.

Nothwithstanding an abandonment of the domicile of origin, and the election of a new domicile, *i. e.* one of choice, it is yet possible to re-acquire the former by abandonment, *animo et facto*, of the latter.(*a*)

By Operation of Law.—The marriage of a woman is the best illustration of how a domicile may be acquired by act and operation of law, since by marriage a woman loses her *domicilium originis*, or if she be a widow, her late husband's domicile, or any other which she may have adopted by choice since his death. So again, should the husband become insane, or commit any crime of the nature of felony, for which he should be transported or otherwise punished, it is submitted with confidence that the wife might select a new domicile differing from that of her husband, who would not however, lose bis original domicile, or acquire a new one in the place where his punishment might happen to locate him, since an occupation by constraint cannot of itself, be considered sufficient to confer a domicile.

In the case of divorces, *a mensâ et thoro et vinculo matrimonii*, a question might arise as to whether or not they operated so as to relieve the wife from the domicile of her husband, and allow her to acquire another by choice, looking at the different legal effects of the two kinds of divorce, and in the absence of any direct legal authority upon the subject, it might with confidence be argued that the divorce, a *mensâ et thoro*, merely operating as a separation, did not destroy the marital relations of the parties towards each other otherwise than by permitting them to live apart from each other, and consequently the legal inference would

(*a*) Craigie *v.* Lew, 3 Curt., 435, referred to in Wms. on Executors, p. 1304, 4th edit.

be, that, notwithstanding the difference of residence, the domicile of the husband would still continue that of the wife; whereas, a divorce, *a vinculo matrimonii*, not only effected a separation, but severing entirely the matrimonial relation, leaves each party, to all intents and purposes, *sole* and free to follow the bent of his or her inclinations, and under such circumstances it is submitted that the maiden, or original domicile of the wife, would revert to her.(a)

Minors and illegitimate children, are other instances under this head, and they have already been noticed. See "By Birth," *ante*, p. 33.

With respect to a party having TWO domiciles. In the case of SOMERVILLE *v.* SOMERVILLE,(b) the Master of the Rolls expressly observes, that the idea of a man having two domiciles for the purposes of succession(c) is monstrous, although he seems to think that for *some purposes* a man may have two domiciles. If such a case were to present itself, it is probable that the Courts would be inclined to think that it would arise rather from the abuse of the meaning of the word domicile, than from any true application of the principles upon which its real meaning is founded; the idea of two contemporaneous and concurrent domiciles is plainly negatived by Bayley B., in *re* Brucc, 2. C. & J., 445; he says: "He might have two domiciles; "he might have a domicile ori- "ginally, and another domicile "by reason of habitation in In- "dia for a considerable time. "*But unless he had abandoned* "*the original domicile, his having* "*acquired a second domicile in* "*India would not get rid of* "*the first domicile;*"(d) thereby clearly showing that he uses the word domicile more in its meaning of residence or habitation, without regard to its strict legal definition; for if the habitation in India had been *animus manendi*, then a new domicile, properly so speaking, would have been created, and the former one abandoned.

And this view is further strengthened by what Sir John Nicholls says in Curling *v.* Thorn-

(a) See the cases upon which this view is taken, cited by the Court in Whitcomb *v.* Whitcomb, 2 Cur. Reports, 352.

(b) 5 Vez. 787.

(c) Kent's Commen. Bk. 37, sec. 4 *n.*

(d) See also Doe d. Thomas et Uxor. *v.* Acklam, 2 B. & C. 779.

ton, reported in Addams' Ecc. Reports, 17, speaking of an abandonment of domicile, "The only abandonment of his *forum originis* by a British subject, which is adequate to this effect must be a *total* and *complete* one;" and he then goes on to doubt, whether or not there could be such a *total* and *complete* abandonment; it is clear therefore from this statement, that in his mind he had no doubt whatever but that a total and complete abandonment of one domicile was, as it were, a condition precedent to the acquirement of another. Durant, in his Dictionary, to which allusion has already been made, says that by "La loi, 6 ff. *ad municip*, c'est decidé qu'une personne peut avoir deux domiciles. Cependant Brodeau sur Louet Lett. c. s. 17, dit que *moribus nostris* l'on ne peut avoir qu'un domicile; ET IL PARAIT EN EFFET que quoique par la loi citeé *ad municip.* il soit permis d'avoir deux domiciles, la loi *cives et incolis* nous fait entendre qu'il ne peut jamais y en avoir qu'un seul principal, *ubi larem rerum ac fortunarum suarum summam constituit.*

It is often a question of very great difficulty to determine the precise domicile of a person; by the very nature of his occupations he may be at one moment in one place, and at another moment in another, having no fixed and determinate residence or habitation, or he may have two residences, in both of which he may have the intention of continuing; for instance, he may reside at one place, and carry on his business at another, occasionally sleeping and dwelling at both, or he may have several places of business; in all these and similar cases it would be by no means an easy task to say what his intentions are; indeed it has been said that a man in transitu can have no domicile; but it is submitted that such a dictum is unsupported by any adjudged case, besides being at variance with the definition which has been given of the word itself, and decidedly a contradiction of the rule, which is, that the *domicilium originis* cannot be lost until there has been a total and complete abandonment of it,(a) for it is now settled that it is im-

(a) Munroe *v.* Douglas; 5 Maddocks, V. C. Rep., p. 379; it is distinctly said by the Vice-Chancellor that an acquired domicile remains until a subsequent domicile be acquired. See also case of Guier *v.* O'Daniel, 1. Binney's Rep., 348.

possible for a man to have no domicile. Now as the only evidence of this complete abandonment would be the acquirement of a new domicile, it follows that until a new one has been actually acquired, *animo et facto*, the original domicile continues.(a) If, however, a man has his place of business in one place, and his family in another, then the latter will be considered his domicile, although he may have precisely the same intentions of continuing in both, and although he exercise the duties of a citizen in both.(b)

It is certain, also, that mere time, without evidence of intention, is insufficient to create a domicile; all that can be said on this point is simply, that a protracted residence in a place, is presumptive evidence of domicile, and in the case of Stanley *v.* Bernes,(c) it was held that the residence of Mr. Stanley, for fifty years in Portugal, outweighed his own declarations; that he always intended to return to England: but this decides after all nothing more but that the Court thought a residence of fifty years, under the particular circumstances of the case, was sufficient to presume an acquired domicile, and did not think the declarations of the party himself sufficient to rebut the presumption which such a lengthened residence raised.

(a) Bruce *v.* Bruce, 2 Bos. & Pull. 228.

(b) See case 5 Ves. 788, 789, 790.

(c) 4 Hagg. Ecc. Rept., 346.

BY APPEAL FROM THE COURT OF EXCHEQUER IN SCOTLAND TO THE HOUSE OF LORDS, IN 1842-1845.

John Thomson, Attorney, for the Executors of John Grant, late of Demerara, deceased, *Plaintiff in Error;* Her Majesty's Advocate-General, *Defendant in Error.*

Personal property having no *situs* of its own, follows the domicile of its owner.

The law of the domicile of a testator or intestate decides whether his personal property is liable to legacy duty.

A British born subject, died, domiciled in a British Colony. At the time of his death he was possessed of personal property locally situate in Scotland. Probate of his will was taken out in Scotland, for the purpose of there administering this property: and out of the fund thus obtained by the executor, legacies were paid to legatees residing in Scotland.

Held, reversing a judgment of the Court of Exchequer in Scotland, that Legacy Duty was not payable in respect of these legacies.

12 Clark & Finnelly, 1.

JOHN GRANT, a British-born subject, and Native of Scotland, made his will in 1829, and died in 1837. At the time of his death he was domiciled in the British colony of Demerara, where the law of Holland was in force. There is not any local duty in the nature of legacy duty payable in that colony.

At the time of the death of *John Grant*, he was entitled to a large personal debt due to him in Scotland, which arose from money acquired by him whilst domiciled in Demerara, and transmitted by him to Scotland for safe custody. After his death, *John Thomson* took out probate of his will, so far as related to the debt in Scotland, and there, from money arising from the said debt, paid in pursuance of the will,

certain legacies, above the amount of twenty pounds, and paid over the rest as part of the residue of the personal estate of *John Grant*.

In July, 1840, an information in debt, setting forth these facts, was filed in the Court of Exchequer in Scotland, by her Majesty's Advocate-General against John Thomson, who appeared and put in a general demurrer, on the ground of insufficiency. Joinder in demurrer. The demurrer came on for argument upon the 29th January, 1841, before the Court of Exchequer in Scotland, and the only question raised was, whether the fact of the domicile of Grant in Demerara, prevented the legacy duty (under the 55th Geo. III, cap. 184, Schedule, part 3[a]) from attaching on his personal property in Scotland. The Court of Exchequer took time to consider, and on the 10th February following, overruled the demurrer, and gave judgment for the Crown.[b]

A writ of error was brought on this judgment. The case was argued in 1842, by Mr. *Pemberton* and Mr. *Anderson*, for the plaintiff in error; and by the Solicitor-General (Sir *W. Follett*) and Mr. *Crompton*, for the defendant in error. It was then directed by their Lordships to be argued before the Judges by one counsel on a side. This argument did not take place till February, 1845, when the case was argued by Mr. *Kelly* (with whom was Mr. *Anderson*) for the plaintiff in error: and by the *Solicitor-General* (Sir *F. Thesiger*, with whom was Mr. *Crompton*) for the defendant in error.

Mr. *Pemberton* and Mr. *Anderson* for the plaintiff in error.—The question here is the same as if the party was

(*a*) Which declares that duty shall be payable "for every legacy, specific or pecuniary, or of any other description, of the amount of 20*l.* or upwards given by any will or testamentary instrument of any person out of his or her personal or movcable estate, or charged upon his or heritable estate," &c.

(*b*) 3 Dunl., Bell, Mur. & Dona., 1309.

an English subject, and the property had been transmitted from Demerara to England. That question is whether the legacy duty is payable in any case except where the party is domiciled in one part of the United Kingdom. It is now settled by this House that personal property has of itself no *situs*, that it must follow the domicile of the owner. That principle applies to this case, and defeats the claim of legacy duty. The *Attorney-General* v. *Forbes*,[a] and *Pipon* v. *Pipon*,[b] are in point. When *Logan* v. *Fairlie*[c] was first decided, the great principle on which these cases depend was not understood. It is not true, as there stated, that administration must be taken out in England in order that the personal property in England of a testator domiciled abroad, should be administered here. [Lord *Campbell*.—In that case the principle of domicile was not applied.] It was not. That case was decided on the supposed authority of the *Attorney-General* v. *Cockerell*,[d] and the *Attorney-General* v. *Beatson*.[e] *Logan* v. *Fairlie*, was in substance reversed in the case of *Arnold* v. *Arnold*,[f] by Lord Chancellor *Cottenham*. And the *Attorney-General* v. *Cockerell* was distinctly reversed in the *Attorney-General* v. *Forbes*.[g] *In re Ewin*[h] was exactly the converse of this case. That case shews that if a party is domiciled in England, he pays legacy duty on personal property situated abroad. The domicile gives the law. The property there had not even been transmitted to this country, and yet the duty was held payable, because the party was domiciled here at the time of his death. That case clearly establishes that personal property for all purposes whatever follows the domicile of the

(*a*) Clk. & Fin. Vol. II., p. 48. (*b*) Ambler, 26.
(*c*) 2 Sim. & Stu., 284; 1 Myl. & Cr., 59.
(*d*) 1 Price, 165. (*e*) 7 Price, 560. (*f*) 2 Mylne & Cr., 256.
(*g*) Clk. & Fin. Vol II., p. 48; nom. Att.-Gen. v. Jackson, 8 Bli., N. S., 15.
(*h*) 1 Cr. & Jer., 151; 1 Tyr., 92.

owner. [*The Lord Chancellor.*—It was treated there precisely as if it was money in the different countries abroad. But the administrator had dealt with it in England.] Not quite so; the case is still stronger, for he had taken measures for the very purpose of avoiding the payment of legacy duty, by not dealing with it, but transferring it by means of foreign powers of Attorney. In the case of *In re Bruce*,(a) it was held that the property of an American citizen, situated in England, the testator dying abroad, was not liable to legacy duty. The only distinction between that case and the present is, that the party there was a foreigner: he having, upon the peace which followed the American Revolution, elected to be an American, and not a British subject. In all other respects that case is identical with the present. That difference alone does not affect the principle on which this case is to be decided. The next case is that of *Logan* v. *Fairlie*,(b) upon its second discussion. There it was argued that *Attorney-General* v. *Forbes* had overruled the decision previously given in that case by the Vice-Chancellor. On the other hand it was answered that the Lord Chancellor, in the House of Lords, had expressly declared that that case did not overrule any of the previous cases. But the Lords Commissioners, in deciding the case then before them, treated the previous decision as in substance overruled, and the domicile of the party was held to settle the law as to the administration of personal property, and therefore as to the duty which was payable on it. *Arnold* v. *Arnold*(c) is exactly in point with the present case. There the party was a British subject domiciled in India, and the property had been remitted to England, and the legacy duty was held not to be payable. [Lord *Campbell.*—It seems to be assumed

(a) 2 Cr. & Jer., 436; 2 Tyr. 475. (b) 1 Myl. & Cr., 59.
(c) 2 Myl. & Cr., 256.

there that an Englishman who holds in India a civil or military appointment, acquires thereby an Indian domicile. But has that been decided?] There has been no direct decision to that effect. The latest case is that of *The Attorney-General* v. *Dunn*,[a] and there legacy duty was held to be payable because circumstances did not shew that the deceased had obtained a foreign domicile; and his English domicile was therefore held to remain. The doubts there hinted at do not affect the decision. Then came *In re Coales*,[b] and there the legacy duty was held to be payable because the testator was domiciled in England at the time of his death, and that domicile affected his foreign property.

The question of domicile is that alone on which these cases depend; and it must be so, for personal property having of itself no *situs*, the moment you get the domicile of the party, you get the *situs* of the property. This case was expressly decided on the erroneous notion that the principle that personal property has no *situs* of its own was not applicable. The duty must be payable according to the law which regulates the succession of the property. The law of succession of personal property is that of the domicile of the party leaving it. Is the property of the testator to pay legacy duty both in the country where it is situated, and in that in which the testator dies, or only in the country where the property is situated? and, if the latter, how is the property to be calculated, and how is the duty to be apportioned? There would be immeasurable difficulties attending the application of a rule subject to so many variations. The only sensible rule is to make the property subject to the duty, which the law of the domicile of the testator indicates.

The *Solicitor-General* (Sir *W. Follett*,) and Mr. *Crompton*, for the defendant in error.—This is the first time in

(*a*) 6 Mee. & Wels. 511. (*b*) 7 Mee. & Wels. 390.

which mere domicile has been put forward as entirely deciding the question of the liability to legacy duty. The party here has the burden of the execution of the will cast upon him, and in respect of that burden the legacies he pays must be subject to legacy duty. The words of the 36th Geo. III., cap. 52, shew this. [Lord *Campbell*.—You say that the statute attaches on the executor. Then you must make a partition. You cannot say that the statute attaches upon him in respect of property over which it does not give him control. You cannot say that the property abroad must pay English duty.] The statute has not imposed the duty on such property. It is the property which he deals with under the English law that is liable to duty. Before the 36th *Geo.* III., cap. 52, the legacy duty was only a receipt tax. That speaks decisively as to the place where the duty was to be paid; namely, where the legacy was paid by one party and received by another. In some respects that is kept up by the 27th sec. of the 36th *Geo.* III., where a receipt is still required to be taken. The case of *In re Bruce*[a] is no authority the other way; for there the testator was a foreigner. [Lord *Campbell*.—Then you rely on the circumstance that the testator in this case was an English subject.] That is so. The property of a British subject is, under the clear and comprehensive expressions of the statute, liable to legacy. But there is no reason why the property of a foreigner, situated in this country, should not pay legacy duty. It is administered here, and is, therefore subject to duty. In *Logan* v. *Fairlie*,[b] the decision by the Lords Commissioners proceeded on grounds that by no means affect the present case. That case was much relied on in *Arnold* v. *Arnold*, which, for the same reason, is not applicable here. Both proceeded on the question of appropriation of the

(*a*) 2 Cr. & Jer., 436. (*b*) 1 Myl. & Cr., 59.

money. The introduction of the question of appropriation shews on what the payment of the legacy duty must depend. It depends entirely on the place where the will is administered, and where the executor takes on himself the burden of that administration. In the present instance that place was Scotland, and the Scotch law, therefore, attached upon it.

The Lords, interrupting the argument, intimated that as this was a case of considerable importance, affecting the whole empire, it ought to be argued in the presence of the Judges; but the argument must then be by only one counsel on a side.

This further argument took place on the 17th February, 1845, when Lord Chief Justice *Tindal,* Justices *Maule, Coltman,* and *Creswell,* and Barons *Parke, Rolfe,* and *Platt* attended the House.

Mr. *Kelly* (with whom was Mr. *Anderson,* for the plaintiff in error.)—The domicile of the testator or intestate decides the question whether the legacy duty is or is not payable. In this case the domicile was at Demerara, where, by the law of the colony, no legacy duty is payable. None therefore can be demanded. It will be contended for the Crown that the duty is payable because the testator was a British subject, and that the very general and extensive words employed in the statute embrace such a case as the present. It will further be argued, that as the property was in part at least locally situated in this country, the duty attaches upon it; but it is submitted that the *situs* of the property does not in the least degree affect the question.

As to the first point, the words of the statute are confined to the wills of persons domiciled in Great Britain, and do not apply to the wills of persons domiciled either in Ireland or the colonies, and cannot certainly apply to the wills of persons domiciled in foreign countries. The words of the statute, however extensive, are not of universal appli-

cation. To make all these classes of persons subject to the duties imposed by the statute, they should have been expressly named in its provisions. That has not been done, and they cannot by mere implication be rendered liable to burdens of this sort. The decision now impeached would, if maintained, operate as a premium on fraud. The legacy duty is claimed because it is said that the debts in Scotland due to the deceased constituted personal estate, to obtain which it was necessary to put the law in motion. Had the Scotch debtors acted honestly, they would have remitted the money to Demerara without the intervention of the law, and according to that argument, no legacy duty would then have been payable.

It cannot be said that the duty payable under this statute is payable upon legacies under wills made in Ireland, for if so, such legacies would have to pay duty twice over, since there is a separate Act of Parliament imposing a duty on legacies in Ireland. Nor can it be contended that because the testator was a British subject, his property in Demerara was liable to this duty, for that would be to levy a tax in the colonies under the authority of an English Act of Parliament, a right to do which has been distinctly and formally disclaimed by the Crown. If the duty attaches at all in this case, it does so only upon the property in this country. But even that ground of liability cannot be insisted on. In the first place, the Act makes no distinction as to parts of the property. It does not declare that one part here shall pay, and another part, situated elsewhere, shall not pay. It makes the whole of the personal property liable together, and in respect of one and the same title. Suppose a man to die in Demerara, and to leave 40,000*l.* of personal property; that of that sum 20,000*l.* were in Demerara, and 20,000*l.* were in this country; and, suppose the executor to come to this country to realize the money here, how is the government to

apportion the duty, when the legacies are paid as much out of the Demerara as out of the English funds. The statute has not provided for any such case. The liability to probate duty is altogether a different matter, for no doubt wherever the party takes out a probate, he must pay the duty upon it. The cases of *Thorne* v. *Watkins*,(a) and *Pipon* v. *Pipon*,(b) explain the confusion, which, upon this point, has arisen in the argument on the other side. So that on the terms of the statute itself it is contended that this duty is not payable.

Then as to the authorities: The *Attorney-General* v. *Cockerell*,(c) and the *Attorney-General* v. *Beatson*,(d) can no longer be considered as law. The case of *In re Ewin*(e) clearly settles that the local situation of the property does not affect the question. [The *Lord Chancellor*.—In the case of *Jackson* v. *Forbes*,(f) the property at the time of the death of the testator was in this country; in *Ewin's* case it was in the funds of four different foreign countries, so that, putting the two cases together, the circumstances are exactly what they are here.] That is so, and taking the cases together, they form a complete answer to the claim set up here. The words of the Act cannot apply to all persons whatever. They must be limited in some way: then how are they to be limited? The authorities shew that they are to be limited by the domicile of the party at the time of his death. *In re Ewin* is a clear authority for that proposition. And so is *In re Bruce*, (g) where property belonging to a foreigner who died abroad, though such property was situated in England and was administered by an English executor, was held not liable to legacy duty. The doctrine thus laid down was

(a) 2 Ves. 35.
(b) Amblor, 26.
(c) 1 Price, 165.
(d) 7 Price, 560.
(e) 1 Cr. & Jerv., 151; 1 Tyr., 92.
(f) 2 Cr. & Jerv., 382; see also the Attorney-General *v.* Forbes, Clk. & Fin., Vol. II. p. 48; nom. Attorney-General *v.* Jackson, 8 Bli. N. S., 15.
(g) 2 Cr. & Jerv., 436; 2 Tyr., 475.

acted on in *Arnold* v. *Arnold*,(a) where Lord *Cottenham* said, "When the Act speaks of the will of 'any person whatever,' and makes this duty payable out of the personal estate, it must, I think, be considered as speaking of persons and wills and personal estates in this country." Acting upon that construction, his Lordship held that a testator domiciled in India was not a person who fell within the provisions of the Act. To the same effect is the final decision in *Jackson* v. *Forbes*, which was first decided in the Court of Exchequer,(b) then went into Chancery, where the decision was affirmed as of course, and finally came here.(c) It is true, that in moving the judgment on that case in this House, Lord *Brougham* said,(d) that he did not overrule any of the former cases; but still it is clear that the judgment of this House proceeded on the law of the domicile, as that which decided the liability to legacy duty, a circumstance which was quite inconsistent with two of the cases there referred to in argument. The case of *In re Coales*,(e) which occurred some time afterwards in the Court of Exchequer, shewed that the law as laid down in the *Attorney-General* v. *Forbes*, was considered as settled. The question came again to be considered in the *Commissioners of Charitable Donations* v. *Devereux*, (f) where, though the will was that of a British subject, and the executors were likewise British subjects, and the property was situated in this country, the Vice-Chancellor held, that the domicile of the testator determined the question, and as that domicile was in a foreign country, the duty was not payable.

On the authorities, therefore, as well as on the construction of the Act itself, the judgment of the Court below ought to be reversed.

The *Solicitor-General* (Sir *F. Thesiger*,) with whom was

(a) 2 Myl. & Cr. 270.
(b) 2 Cr. & Jerv., 382.
(c) Clk. & Fin., Vol. II., p. 48; 8 Bli. N. S., 15.
(d) Clk. & Fin., Vol. II., p. 83.
(e) 7 Mec. and Wels., 390.
(f) 6 Jurist, 616.

Mr. *Crompton*, for the Crown.—The question which arises in the present case has never yet been settled. Its importance and difficulty appear to have been felt by this House. The whole argument upon the other side is made to rest upon the domicile of the party. It is most remarkable that in no other cases but those of *Ewin* and of *Bruce* were the decisions rested on the principle of domicile. That is not the true principle by which the law, applicable to such a case as the present, is to be determined. The duty attaches here, wherever there is a person acting in this country in execution of the will. That is the principle which must govern the decision, and which will alone reconcile all the cases.

By all the statutes passed before the 36th Geo. III., the legacy duty was payable on the receipt of the money. If a native paid a legacy to a foreigner, that legacy would, on the payment being made, have been liable to the receipt stamp duty. That shews that there was no statutory distinction as to liability. In passing that statute it was not the intention of the legislature to change the liability, and merely to impose a higher rate of duty. The liability remained as before. That liability depends on the act of administering the fund. The question, therefore, is whether the act of administering the fund in Scotland was the act of paying legacies, whether it was an act done in Great Britain, so as to enable the provisions of the statute to attach upon it; for it must be admitted that in terms this is a statute limited to Great Britain. No one can doubt that here has been an act of paying legacies within Great Britain; and the provisions of the statute do therefore attach upon it. What are the words of the statute 55th Geo. III. cap. 184? They are (adopting those used in the 36th Geo. III., cap. 52, sec. 2) that "for every legacy, specific or pecuniary, given by any "will of any person out of his personal or moveable estate, "or out of or charged upon his real or heritable estate," the

duties imposed by that Act shall be payable. It is impossible to employ words more general and comprehensive, and the burthen of shewing that these legacies are not liable to the duty, lies upon those who claim the exemption, and must be made out by something more direct than the supposed application of a principle of law, which, however well established, must be deemed inapplicable to the fiscal regulations of a country. Here there is a British subject "taking on himself the execution of the will," that being the very expression used in the earliest Acts of Parliament, and paying legacies out of the personal estate. Where the case is so clearly within the words of the statute, the principle of domicile cannot apply to make those words inoperative. The property, the executor, and the legatees, were in this country, and the executor was obliged to take out probate here in order to administer that very property. The honesty or dishonesty of the debtor does not affect the matter. The question is whether a probate was necessary or not—was the unappropriated property in this country, which the party got possession of in his representative character,—a character with which the English law clothed him, and did he distribute it to legatees in this country? These questions must be answered in the affirmative. It may be admitted that, if after probate taken out, the money had been voluntarily paid by the bankers: the mere act of taking out probate would not of itself decide the question, whether the legacy duties were payable or not. The real question is whether the party obtained the money in his representative character under the probate, or only as the mere attorney or agent of the testator. The argument on the other side would go to relieve a party from the payment of the legacy duty, though some of the legacies were specifically payable abroad; and some specifically payable here. Now, not one of the authorities goes further than to say that where the appropriation of the fund has

been made abroad, and the fund is transmitted here, and a mere act of payment by an agent under the authority of that foreign appropriation is made here, the legacy duty is not payable. No such specific appropriation was made here. So that even if the law was as thus stated, it would not exempt the party in this instance from the payment of the duty.

The domicile may fix the law of the succession; but it does not affect the payment of the legacy duty. The earlier authorities are all supposed to have been overruled by the case of the *Attorney-General* v. *Forbes*,(a) but though the authority of the *Attorney-General* v. *Cockerell*,(b) and the *Attorney-General* v. *Beatson*,(c) may, perhaps, not be sustainable to the full extent of what was once supposed to be the rule they laid down, they are consistent with the principle now submitted as that on which the House will decide, namely, that the liability to duty attaches on administration of the fund in this country; and to that extent at least they are valid authorities. In the latter of these two cases especially, Mr. *Murray*, who was the residuary legatee, and, as such, entitled to the whole of the money, might have received it from the agents to whom it was transmitted; but he, unnecessarily, took out administration with the will annexed, and the Court therefore held that the legacy duty attached upon the property afterwards received by him. The case of *Logan* v. *Fairlie*,(d) does not impeach this principle. On the contrary, the principle now contended for was laid down in the first decision there by the Vice-Chancellor, and was subsequently applied by Lord *Cottenham*,(e) who, however, excepted that case from its operation, because he held that

(a) Clk. v. Fin., Vol. II., p. 48.
(b) 1 Price, 165.
(c) 7 Price, 560.
(d) 2 Sim. & Stu. 284.
(e) 1 Myl. & Cr. 59, 68.

there the money had been directly appropriated in the East Indies, and devoted to a particular and distinct purpose here; so that all that was done here was the mere act of paying by the hands of an agent. [*The Lord Chancellor.*—The last case of *Logan* v. *Fairlie,* is nothing more than this: The Court did not decide any other question than whether there had been or not an appropriation in India.] But Lord *Cottenham* must be taken to have admitted the rule as to the liability to duty laid down by the Vice-Chancellor. [*The Lord Chancellor.*—Nothing was decided but the question of appropriation.] The case of *Jackson* v. *Forbes* (*a*) is no authority for the plaintiff in error; for that turned on the question whether the fund had or had not been appropriated in India. The same observation may be made on that case, when under the name of the *Attorney-General* v. *Forbes,* (*b*) it came before this House. Lord *Brougham* there (*c*) referred to the two cases of *Attorney-General* v. *Cockerell,* and *Attorney-General* v. *Beatson,* and said that the House did not overrule any of the preceding cases, but that each rested on its peculiar circumstances. The next case is that of *Arnold* v. *Arnold,* (*d*) and though it must be admitted that that case cannot be reconciled with the cases of the *Attorney-General* v. *Cockerell,* and the *Attorney-General* v. *Beatson,* yet in delivering judgment there, Lord *Cottenham* took great care to shew that it did not fall within the authority of *Logan* v. *Fairlie.* [*The Lord Chancellor.*—I consider that in all these cases domicile was the basis of the whole judgment; the only question was what was the effect of the other circumstances upon the rule of domicile.] It seems difficult to come to that conclusion, since the rule as to domicile would have rendered quite unnecessary any discussion as

(*a*) 2 Cr. & Jerv. 282.
(*b*) Clk. *v.* Fin., Vol., p 48.
(*c*) *Id.* 82.
(*d*) 2 Myl. & Cr. 256.

to the appropriation of the fund. Domicile, in some of these cases, never was argued upon, and was not made the ground of the decision. This is especially to be observed in the case of *Arnold* v. *Arnold*. [*The Lord Chancellor*.—In that case all the funds were sent here from India, to be administered here according to the will.] No; they were sent for the mere purpose of being paid to the legatees. Strictly speaking, there was no administration here—that is a term of a technical nature. If the fund is sent over to be divided, it is sent over for the purpose of administration; but if it is sent merely to be paid, the person paying it would exercise no discretion, and then there would be no administration.

If this statute does not apply to property coming from abroad to be distributed in this country, how can the probate duty be payable? There can be no distinction in principle between probate and legacy duty. Both are the subjects of the fiscal regulations of this country. [The *Lord Chancellor*.—If a will is made by a foreigner resident abroad, and it is necessary to administer his estate in England, probate must be taken out for that purpose, and probate duty becomes payable upon the mere taking out of the probate; but the question here is, whether under such circumstances, legacy duty will be payable.]

In the case of *In re Bruce*,(*a*) the Court asked whether *Bruce* was a foreigner. That question would not have been put, if domicile could have given the rule. According to Doe *v.* Acklam, (*b*) there could be no doubt that *Bruce* having elected the United States as his country, was a citizen of those States, and the case proceeded on that fact, and he was held entitled to transmit property to this country free from any British burden. That, however, is bad law.

(*a*) 2 Cr. & Jer. 436. (*b*) 2 Barn. & Cres. 779.

Property in this country is liable to British burdens, although it may be a foreigner's property. *In re Coales.*(a) The income tax is a proof of this.

The *Attorney-General* v. *Dunn*(b) is the first case in which the question of domicile was distinctly submitted to the Court; but, as the Court held that in fact the testator had an English domicile, that question was not decided. The last case on the subject is that of *The Commissioners of Charitable Bequests* v. *Bevereux*,(c) and it is impossible that the Vice-Chancellor could have said what is there imputed to him, for he is made to refer to *Re Bruce*, and to say, "Whether the testator there was a British subject does not appear;" when it does most clearly appear from several parts of that case that *Bruce* was a foreigner. [*The Lord Chancellor.*—The decision as reported in the *Jurist* is right, but the judgment is wrong in terms. It does not matter, for the purpose of this argument, what are the expressions used, but what was the point decided? According to my view of the subject, the decision there was correct, for the domicile was in France.]

There is one case decided in Scotland, by Lord Chief Baron *Shepherd*, which, if considered an authority, must govern the present. It is the case of the *Advocate-General* v. *Col. F. W. Grant*. There the party was domiciled abroad; he made a will, the executor resided in Scotland. The testator had real and personal property in Scotland, and he left legacies (which were charged on the realty,) to persons who were resident there. The will was administered in Scotland, and the Court held that the legacy duty attached. This case is stated from the copy of the notes of the Chief Clerk of the Remembrancer's office in Scotland, and is directly in point with the present. The Court there said that the executor

(a) 7 Mee. & Wels. 390. (b) 6 Mee. & Wels. 511.

(c) 6 Jurist, 616; since reported 13 Sim. 14.

being resident in Scotland, the question as to the testator residing, and the will being made abroad, did not arise, and that the real principle was that the law affected British property, that is to say, property to which the party derived title from British law and British courts.

This case differs from the Indian cases in one very important respect. In them the property, at the time of the death of the testator, was in India; here it was in Scotland. In them, therefore, the question arose whether the property was appropriated before it reached this country. That question cannot arise here. Those cases are therefore inapplicable to the present, so far at least as they are put forward as authorities which must decide it. The fund in this case was here, the executor was here, the administration of the fund was here, and that fund, therefore, became liable to the payment of British legacy duty. The judgment of the Court below must be affirmed.

The *Lord Chancellor*.—The Solicitor General has, in my view of the case, stated every thing that the subject admits of. The argument has been an able one; but, notwithstanding what has fallen from him, we do not think it necessary to hear Mr. *Kelly* in reply. I propose to put the following question to the Judges:—"*A.*, a British born subject, born in England, resided in a British colony. He made his will, and died domiciled there. At the time of his death he had debts owing to him in England. His executors in England, collected these debts, and out of the money so collected paid legacies to certain legatees in England. The question is, are such legacies liable to the payment of legacy duty?"

Lord Chief Justice *Tindal,* in the name of his brethren, requested time to consider the question.

The request was acceded to, and the House was adjourned during pleasure. In about an hour the House was resumed.

Lord Chief Justice *Tindal* then delivered the unanimous opinion of the Judges. Having read the question put to the Judges he said: In answer to this question I have the honour to inform your Lordships that it is the opinion of all the Judges who have heard the case argued, that such legacies are not liable to the payment of legacy duty.

It is admitted in all the decided cases, that the very general words of the statute, "every legacy given by any will or testamentary instrument of any person," must of necessity receive *some* limitation in their application, for they cannot in reason extend to every person, everywhere, whether subjects of this kingdom or foreigners, and whether at the time of their death domiciled within the realm or abroad. And as your Lordships' question applies only to legacies out of personal estate, strictly and properly so called, we think such necessary limitation is, that the statute does not extend to the will of any person who at the time of his death was domiciled out of Great Britain whether the assets are locally situate within England or not. For we cannot consider that any distinction can be properly made between debts due to the testator from persons resident in the country in which the testator is domiciled at the time of his death, and debts due to him from debtors resident in another and different country; but that all such debts do equally form part of the personal property of the testator or intestate, and must all follow the same rule, namely, the law of the domicile of the testator or intestate.

And such principle we think may be extracted from all the later decided cases, though sometimes attempts have been made, perhaps ineffectually, to reconcile with them the earlier decisions. There is no distinction whatever between the case proposed to us and that decided in the House of Lords, the *Attorney-General* v. *Forbes*,(a) except the circum-

(a) Clk. v. Fin., Vol. II. p. 48.

stance that in the present question the personal property is assumed to be, for the purpose of the probate, locally situated in England, at the time of the testator's death. But that circumstance was held to be immaterial in the case *In re Ewin*,(a) where it was decided that a British subject dying domiciled in England, legacy duty was payable on his property in the funds of Russia, France, Austria, and America.

And again in the case of *Arnold* v. *Arnold*,(b) where the testator, a natural born Englishman, but domiciled in India, died there, it was held by Lord Chancellor *Cottenham*, that the legacy duty was not payable upon the legacies under his will, his Lordship adding: "It is fortunate that this question which has been so long afloat is now finally settled by an authoritative decision of the House of Lords."

And as to the arguments at your Lordships' bar on the part of the Crown, that the proper distinction was, whether the estate was administered by a person in a representative character in this country, and that in case of such administering, the legacy duty was payable, we think it is a sufficient answer thereto that the liability to legacy duty does not depend on the act of the executor in proving the will in this country, or upon his administering here; the question as it appears to us, not being whether there be administration in England or not, but whether the will and legacy are a will and legacy within the meaning of the statute imposing the duty.

For these reasons we think the legacies described in your Lordships' question are not liable to the payment of legacy duty.

The *Lord Chancellor*. — My Lords, in consequence of something that was thrown out at your Lordships' bar, I think it proper to state that it was not from any serious

(a) 1 Cr. & Jerv. 151. (b) 2 Myl. & Cr. 256.

doubt or difficulty which we considered to be inherent in this question in the former argument, that we thought it right to ask the opinion of the Judges, but it was on account of its extensive nature; and, because though the question applied only to Scotland in the form in which it was presented to your Lordships' House, it did in reality and in substance apply to the whole empire—not only to Great Britain, but in substance to Ireland, and to all the British possessions. We thought it right, therefore, in consequence of the extensive nature and operation of the question, that the case should be argued a second time; and we also thought, from the nature of the question, that it was proper to require the attendance of Her Majesty's Judges upon the occasion, because we thought that the judgment of your Lordships' House being in concurrence with the opinion of the learned Judges, would possess that weight with your Lordships, and with the country, which upon all occasions it is desirable it should receive.

My Lords, it appeared to me in the course of the argument that the question turned, as it must necessarily turn, upon the meaning of the statute. In the very first section of the statute the operation of it is limited to Great Britain. It does not extend to Ireland. It does not extend to the colonies. And, therefore, notwithstanding the general terms contained in the Schedule, those terms must be read in connection with the first section of the act, and it is clear, therefore, that they must receive that limited construction and interpretation, which is alone consistent with the first section of the act. Accordingly, my Lords, it has been determined in the case that was cited at the bar, *In re Bruce*,(a) that it does not apply, notwithstanding the extensive terms in which it is framed, to the case of a foreigner

(a) 2 Crom. & Jer. 436.

residing abroad, and a will made abroad, although the property may be in England, although the executors may be in England, although the legatees may be in England, and although the property may be administered in England. That was decided expressly in the case *In re Bruce*, which decision, so far as I am aware, has never been disputed, but in which the Crown seems to have acquiesced.

Also, my Lords, it has been decided in the case of British subjects domiciled in India, and having large possessions of personal property, which come to be disposed of in England, that the legacy duty imposed by the Act of Parliament does not apply to cases of that description, although the property may have been transmitted to this country by executors in India to executors in this country, for the purpose of being paid to legatees here. Those are the limitations which have been put upon the Act by judicial decisions.

But then this distinction has been attempted to be drawn, and it is upon this distinction that the whole question here turns. It is said that in this case a part of the property was in England at the time of the death of the testator, a circumstance that did not exist in the case of the *Attorney-General* v. *Forbes*, and which did not exist in the case of *Arnold* v. *Arnold;* and it is supposed that some distinction is to be drawn with respect to the construction of the Act of Parliament arising out of that circumstance. I apprehend that that is an entire mistake, that personal property in England follows the law of the domicile, and that it is precisely the same as if the personal property had been in India at the time of testator's death. That is a rule of law that has always been considered as applicable to this subject; and accordingly the case which has been referred to by the learned Chief Justice, the case of *In re Ewin*,(a) was a case of this description. An

(a) 1 Crom. & Jer. 151.

Englishman made his will in England: he had foreign stock in Russia, in America, in France, and in Austria. The question was whether the legacy duty attached to that foreign stock, which was given as part of the residue, the estate being administered in England; and it was contended, I believe, in the course of the argument by my noble and learned friend who argued the case, in the first place, that it was real property, but, finding that that distinction could not be maintained, the next question was whether it came within the operation of the Act, and although the property was all abroad, it was decided to be within the operation of the Act as personal property, on this ground, and this ground only, that as it was personal property, it must, in point of law, be considered as following the domicile of the testator, which domicile was England.

Now, my Lords, if you apply that principle, which has never been quarrelled with, which is a known principle of our law, to the present case, it decides the whole point in controversy. The property, personal property, being in this country at the time of the death, you must take the principle laid down in the case of *In re Ewin*,(a) and it must be considered as property within the domicile of the testator, which domicile was Demerara. It is admitted that if it was property within the domicile of the testator in Demerara, it cannot be subject to legacy duty. Now, my Lords, that is the principle upon which this case is to be decided. The only distinction is that to which I have referred, and which distinction is decided by the case *In re Ewin* to be immaterial.

Now, my Lords, such being the case and the principle upon which, I think, this question should be decided, I was desirous of knowing what were the grounds of the judgment of the Court below. I find that the judgment was delivered

(a) 1 Cr. & Jerv. 151.

by two, or, rather, that the ease was heard by two very learned judges, Lord *Gillies* and Lord *Fullerton*. The judgment was delivered by the late Lord *Gillies*. I was anxious, therefore, from the respect which I entertain for those very learned persons, to know what were the grounds upon which their judgment was rested.

The first ease to which they referred, for it was principally decided upon authority, was a ease decided before Sir *Samuel Shepherd*, Chief Baron of Scotland. That case in the judgment was very shortly stated, and I am very happy that the Solicitor-General gave us the particulars of that ease, for it appears that the legacy was charged upon real estate, and, therefore, it would not come within the principle which I have stated; and there might, therefore, have been a sufficient ground for the decision in that ease. It is sufficient to say, that it does not apply to the ease which is now before your Lordships' House.

Then the next ease which was referred to was the ease of the *Attorney-General* v. *Dunn*;(a) but, my Lords, that could hardly be cited as an authority. It is true the point was argued; but it was not necessary for the decision of the ease; and no decision, in fact, was given upon the point. The Lord Chief Baron pointedly reserved his opinion, and said, that he should not express what his opinion was; also the learned Judge near me, Mr. Baron *Parke*, expressed the same thing. It is true, that one of the learned Judges said that, at that moment, according to the impression upon his mind, he rather thought the duty would be chargeable; he expressed himself in those terms according to his immediate impression; but no decision was given upon the point, it was a mere *obiter dictum*—and surely such a *dictum* as that ought not to be cited as the foundation of a judgment of this

(a) 6 Mee. & Wels. 511.

description. Looking at the authorities, therefore, they appear to me not properly to support the judgment of the Court below.

The third authority was that of Lord *Cottenham*. Now, Lord *Cottenham* in the case of *Arnold v. Arnold,* (a) expressly states in terms, that the two cases, *The Attorney-General* v. *Cockerell,*(b) and *The Attorney General* v. *Beatson,*(c) he considered to have been overruled. He states that in precise terms. A particular passage is selected from the judgment of Lord *Cottenham* to support the opinion of the learned Judges in the Court below, but I am quite sure when that passage is read in connection with the whole judgment of that very learned person, every person reading it with attention must be satisfied that the inference drawn from that particular passage that was cited is not consistent with the whole tenor of the judgment. It appears to me, therefore, that none of the authorities cited by the Court below sustained the judgment; and I am of opinion, therefore, independently of the great respect which I entertain for the judgment of the learned Judges who have assisted us upon this occasion, that upon the true construction of the Act of Parliament, and applying the known principles of the law to that construction, the legacy duty is not in a case of this description chargeable. I shall, therefore, move that the judgment in this case be reversed.

Lord *Brougham.*—My Lords, I entirely agree with my noble and learned friend in the view which he takes of the construction of this statute, and of the authorities, and of the argument, so far as it is there endeavoured to distinguish this case from that of *The Attorney-General* v. *Forbes,*(d) which must be taken with *In re Ewin,* a case that also arose in the Exchequer, and when the two cases are thus considered, no

(a) 2 Myl. & Cr. 256.
(b) 1 Price, 165.
(c) 7 Price, 560.
(d) Clk. v. Fin., Vol. II., p. 48.

doubt can be felt upon the matter. I so entirely agree upon all those three heads with my noble and learned friend, that I do not think it necessary for me to do more than generally to express my concurrence. I wish, however, also to add that my recollection coincides perfectly with his as to the reasons for troubling the learned Judges to attend in this case. It was not only that it was a case from the Scotch Exchequer, but it was a case which must impose a construction upon the General Legacy Act, applicable to England and to all the British colonies, and to foreign countries; and, therefore, we considered that it was highly expedient to have a general consideration of the case, and the assistance of the learned Judges. But we also felt this, which I am sure the recollection of my noble and learned friend will bear me out in adding, and which the recollection of my noble and learned friend near me, who was also present at the former argument (Lord *Campbell*), has entirely confirmed, namely, that we considered this to be a case in which there was a conflict of decisions, a conflict of authorities, which made it highly expedient that it should be settled after the fullest and most mature deliberation, with the valuable assistance of the learned Judges; for there was the authority of *Jackson* v. *Forbes*, (*a*) in the Exchequer, and afterwards before me in Chancery, and ultimately before your Lordships in this House, by appeal on a Writ of Error; (*b*) there was that authority on the one hand, with the decision of the Exchequer not appealed against, in the matter of *Ewin* (*c*) on the other, and the authority of those decisions appeared to be marked by some discrepancy at least, more apparent perhaps than real, with the two former

(*a*) 2 Crom. & Jerv., 382.

(*b*) *Nom.* the Attorney-General *v.* Forbes, Clk. *v.* Fin., Vol. II., p. 48; and *nom.* The Attorney-General *v.* Jackson, 8 Bli. 15.

(*c*) 1 Crom. & Jerv. 151.

cases of *The Attorney-General* v. *Cockerell*(a) and *The Attorney-General* v. *Beatson*.(b) It became, therefore, highly expedient that we should maturely weigh the whole matter, before we held that that decision of the House of Lords in *The Attorney-General* v. *Forbes* had completely overruled those other cases, the rather because certainly words were used in disposing of the *Attorney-General* v. *Forbes*, which seemed to intimate the possibility of those former cases standing together with the latter case. Upon full consideration, however, I am clearly of opinion with Lord *Cottenham*, who expressed that opinion very strongly in the case of *Arnold* v. *Arnold*, that those two cases of *The Attorney-General* v. *Cockerell*, and *The Attorney-General* v. *Beatson*, cannot stand with the case of the *Attorney-General* v. *Forbes*. Then, my Lords, that last case must be considered not merely by itself, as regards its bearing upon the facts of the present case, but it must be taken into consideration coupled with the case of *In re Ewin*, because otherwise ground might be supposed to exist for distinguishing the two cases, inasmuch as it might be, and has been contended, and ably contended at the bar, that the one case does not apply to the other, because part of the funds were in the present case locally situated in this country. But then take the case of *Ewin*, and your Lordships must perceive at once, as my noble and learned friend has done, and as the learned Judges have done, that those two cases together in fact exhaust the present case, because what was wanting in *The Attorney-General* v. *Forbes*, is supplied by the decision in the matter of *Ewin*; I will not say, supplied in terms; but in what comes to the same thing, in the argument upon the construction of the Statute, and in the legal application of the principle, the converse was decided. Here it is a case of money or property brought over here and

(a) 1 Price, 165.

(b) 7 Price, 560.

administered here, the domicile of the testator or intestate being abroad out of the jurisdiction. There in the matter of *Ewin*, it was the converse, administration being by a person domiciled here, and a testator or intestate domiciled here, and the funds locally situate abroad; it is perfectly clear that no difference can be made in consequence of that, because the principle, *mobilia sequntur personam*, as regards their distribution and their coming or not within the scope of this Revenue Act, must be taken to apply to two cases precisely similar; and the rule of law, indeed, is quite general that in such cases the domicile governs the personal property, not the real; but the personal property is in contemplation of the law, whatever may be the fact, supposed to be within the domicile of the testator or intestate.

I entirely agree with my noble and learned friend in the view which he has taken of the grounds of the decision of the Court below; whether that decision was before or subsequent to the decision in the case of *The Attorney-General* v. *Forbes*, and the matter of *Ewin*, I am not informed.

The Lord Chancellor.—It was subsequent.

Lord Brougham.—Then their Lordships ought clearly to have taken it into account, and more especially if they had the additional light which is thrown upon the subject by the case of *Arnold* v. *Arnold*.

The Lord Chancellor.—They cite *Arnold* v. *Arnold*.

Lord Brougham.—That makes it still more clear that the foundation of their decision was unsound. It is to be taken into account that Lord *Cottenham* does not give his opinion in *Arnold* v. *Arnold* merely upon the authority of *The Attorney-General* v. *Forbes*, because he expressly says, and very candidly and fairly says, doing justice to the grounds of the decision of your Lordships in this House, that, independently of authorities, he is of the same opinion, and should have come to the same opinion as we did in that case, notwithstand-

ing the conflict that appears to exist between other cases. We have, therefore, the clearest reasons for saying that if my noble and learned friend had not been unfortunately absent to-day, he would have concurred entirely in this view of the case.

Upon the whole, therefore, I entirely concur in the opinion of my noble and learned friend, and acknowledge fully, and with thanks, the assistance which we have derived from the learned Judges (giving the reasons which I have given for our wishing to have their attendance rather than from any great doubt or difficulty which we felt the case to be encumbered by); and, therefore, my Lords, I second my noble and learned friend's motion, that judgment be given for the plaintiff in error.

Lord Campbell.—My Lords, I confess that in this case I did once entertain very considerable doubts; and I was exceedingly anxious that your Lordships should have the assistance of the Queen's Judges in a case that admitted, as it seemed to me, of great doubt, and where the decisions were directly at variance with each other. Having heard the opinion of the learned Judges, it gives me extreme satisfaction to say that I entirely concur in it, and that the doubts which I before entertained are now entirely removed. Having heard the opinion of the learned Judges, I defer to it with the greatest possible respect, as I certainly should have done under any circumstances, though, if it had not satisfied my mind, of course I should have found it my duty to act upon the result of my own judgment; but with the assistance of the learned Judges, under the present circumstances, I am relieved from anything of that sort, because I agree with them in the result to which they have arrived, and in the reasons which they have assigned for the opinion which they have given to your Lordships.

At the same time, my Lords, I believe that if the Chan-

cellor of the Exchequer, who introduced this bill into Parliament, had been asked his opinion, he would have been a good deal surprised to hear that he was not to have his legacy duty on such a fund as this, where the testator was a British born subject, and had been domiciled in Great Britain, and had merely acquired a foreign domicile, and had left property that actually was in England or in Scotland at the time of his decease. The truth is, my Lords, that the doctrine of domicile has sprung up in this country very recently, and that neither the Legislature nor the Judges, until within a few years thought much of it; but it is a very convenient doctrine, it is now well understood, and I think that it solves the difficulty with which this case was surrounded. The doctrine of domicile was certainly not at all regarded in the case of *The Attorney-General* v. *Cockerell*, nor in that of *The Attorney-General* v. *Beatson*. If it had been the criterion at that time, there would have been no difficulty at all in determining this question; but now, my Lords, when we do understand this doctrine better than it was understood formerly, I think that it gives a clue which will help us to a right solution of this question.

It is impossible that the words of the statute can be received without any limitation; foreigners must be excluded. Then the question is what limitation is to be put upon them? and I think, the just limitation is, the property of persons who die domiciled in Great Britain. On such property alone, I think, can it be supposed that the Legislature intended to impose this tax. If a testator has died out of Great Britain with a domicile abroad, although he may have personal property that is in Great Britain at the time of his death, in contemplation of law that property is supposed to be situate where he was domiciled, and, therefore, does not come within the Act: this seems to be the most reasonable construction to be put upon the Act of Parliament; it is the

most convenient, any other construction would lead to very great difficulties, and, I think, the rule which is laid down by the learned Judges may now be safely acted upon, and will prevent difficulties and doubts arising hereafter. But I think that this caution should be introduced, that this applies only to legacy duty, not to probate duty. With respect to the probate duty, if it is necessary to take out probate, the property being in Great Britain, for the purpose of administering that property, the property would still be considered as situate in Great Britain, and the probate duty would attach. All the cases respecting probate duty are considered untouched; but, with respect to the legacy duty, those two cases, *The Attorney-General* v. *Cockerell*, and *The Attorney-General* v. *Beatson*, must be considered as completely overturned, and domicile with respect to legacy duty is hereafter to be the rule.

The Lord Chancellor.—There is no question in the case as regards the probate duty, it cannot be supposed for a moment that this affects the probate duty. Your Lordships will allow me, in your name, to tender our best thanks to the learned Judges for their attendance to this case.

Judgment of the Court below reversed.

VARIOUS propositions were laid down in the case of Attorney General *v.* Thompson, which may fairly he considered as having established and settled the law on this subject. Yet in the case mentioned in the preface, which was subscquent in point of date to the last mentioned decision, the Commissioners demanded, and actually received, a considerable sum on account of legacy duty, although the facts of that case were identical with, and should have been governed by, the same rule of law which decided the case of Attorney General *v.* Thomson. The 1st of these propositions may be thus stated:—"*That personal property follows the person of the testator.*" The 2nd, "*That the domicile of the party is the only sound principle upon which a decision may be safely founded.*" The 3rd is of a negative character and decides, "*That the statute does not extend to the will of persons at the time of their death domiciled out of Great Britain, whether the assets be locally situate in England or not.* The 4th, "*That the liability to legacy duty does not depend on the act of the executor in proving the will in this country or upon his administering here.*" That 5th and last, "*That the statute is limited in its operation to Great Britain, not extending to Ireland or to the colonies, and therefore notwithstanding the general terms contained in the schedule, these* terms must be read in connexion with the first section of the Act."

1st. *That personal property follows the person of the testator.* (See the learned observations and the decision *In Re Ewin's* case, and all subsequent decisions cited in this work, in respect to the liability of personal property, wherever it may be situated, at the time of its owner either dying domiciled in Great Britain, or abroad.

2nd. *That the domicile of the party is the only sound principle upon which a decision can be safely founded,* is a rule which appears to be at once the most natural and most consistent with common sense; since it may be fairly presumed that where the domicile is, there in most instances will be the representatives of the testator, as well as his property: at any rate, it is more than likely that the first steps taken to realize the property, wherever it may be, will be taken there, and it would indeed be a hard case, if

the duty were to follow the property as well as the domicile; for, in that event, if a tax existed in the place or country where the testator died, or where his will was proved, preparatory to its being carried out by his representatives, the property would be charged with a double liability, one to the country where he died, the other where the property might happen to be at the time of his death.

There are many authorities for this second position: see the cases of Attorney-General *v.* Dunn and Anr., 6 M. & W. 511, 1840; In Re Phillip Coates, 7 M. & W. 390, 1841; the Commissioners of Charitable Donations and Bequests in Ireland *v.* Devereux, 13 Sim. 14, 1842. The first mentioned was the case of a British subject, having property real and personal, both in England and Italy, having purchased in the latter country an estate and title; the evidence was not conclusive as to what his intention might have been with regard to his residence; from 1828 to 1831 he resided in Italy, superintending alterations and improvements in the property he had bought; from 1831 to 1832 he was in England when he made his will; in this latter year he left for Italy, and there resided until his death, in 1834. Upon these facts it was held, that the testator could not be said to have acquired a foreign domicile, and that consequently Legacy Duty was payable on the bequests contained in his will. In the second case, the usual order had been obtained, under the 42 Geo. III., cap. 99, sec. 2, calling upon the executors of Mrs. Dyneley, deceased, who was the surviving executrix of Philip Coates, to shew cause why they should not deliver an account of the legacies and property of the said Philip Coates, and pay the Legacy Duties. It appeared that the testator died domiciled in England, and by his will he disposed of certain government notes of the East India Company, issued at Calcutta, the amount of which was receivable only under an Indian probate, and appointed an English executor. The executor executed a power of attorney to some person in India, who obtained letters of administration with the will annexed in India, under which he received the amount of the notes, which he remitted to the executor in England, who paid it over to the legatees:—

Held, that inasmuch as the domicile was English, and the property personal, the fact of an Indian probate being necessary was immaterial, and therefore the Legacy Duty attached.

The third case was that of a British subject, who, having settled in *France*, became naturalized and the owner of an estate there. In 1791 he left *France*, and came to England in consequence of the French Revolution, and shortly afterwards his property was confiscated by the revolutionary government. In January 1802 he made a will in *London*, by which he left his property partly to a charity in Ireland, and partly to individuals resident in *England*, and appointed one of those individuals his executor. In April 1802 emigrants were permitted to return to *France*, and soon afterwards he returned to that country. In 1804 he made a will in *Paris*, in which he stated that he was born in *Waterford*, and had come to France to obtain restitution of his estate, and after referring to his former will, which he had mislaid in *London*, he recapitulated very nearly its contents, and concluded by expressly confirming it. He died in *Paris*, in 1806, and the two testamentary papers were proved in *France*, and in *England*. Under the treaty of peace between *England* and *France*, in 1815, a large sum of French stock was set apart by the then French government, for the purpose of compensating British subjects, whose property had been confiscated by the revolutionary government, and part of that sum was awarded, by the Commissioners appointed by the British government, to the testator's executors, for the loss of the testator's property in *France*. The Commissioners, under the powers of an Act of Parliament, sold the stock so awarded, and paid the proceeds into the Court of Chancery.

Held that the testator was domiciled in *France*, at his death, and that the fund in Court was not subject to Legacy Duty.

All these cases are confirmatory of those which have been mentioned as laying down the principle, that the domicile of the testator is the only rule which ought to guide the Courts in their decisions on this subject, and in each of them, the authority of *Re Ewin* and *Re Bruce* was distinctly recognised.

3rd. *That the statute does not*

extend to the will of persons at the time of their death domiciled out of Great Britain, whether the assets be locally situate in England or not. This was decided in the case of ARNOLD *v.* ARNOLD, 2 Myl. & C. 256—s. c. 2 Myl. & Keen. 365. Upon a careful consideration of all the principal cases, we have therefore given this case more in detail than we thought it requisite or necessary to do in other cases to which allusion has been made. The facts are shortly these:—George Arnold, a lieutenant in the East India Company's service, being possessed of a large personal estate, situate partly in England, but principally in the East Indies, where he and his family resided, having made his will in the East Indies, and died there, bequeathed several legacies to a considerable amount. Among others, he gave to his wife £1000 sterling, and all his wines and property in England; to his daughter, Sophia Mary Arnold, £15,000 sterling; to any child with which his wife might be pregnant at his death, £15,000 sterling; to Louisa Harriet Adams 100,000 Sicca rupees, to be invested in good securities as soon after his decease as convenient; to Setterah Khammar Adams, a native woman, the mother of Louisa Harriet Adams, the interest of 10,000 Sicca rupees during her life, to be vested in the Company's funds when a favourable opportunity might occur, and after her death the principal to revert to his residuary legatee. The testator appointed James Robinson Arnold, Pownal Phipps, Leonard Strute Coxe, William Patrick Shedden, and George St. Patrick Lawrence, his executors.

At the testator's death he left his widow and one child, Sophia Mary Arnold, an infant surviving him. Within a month after his death, his widow was delivered of a son, named George Arnold; shortly afterwards, Mrs. Arnold with her infant children left India, and came to England, where they arrived in May, 1829.

On the 30th of April, in the same year, George St. Patrick Lawrence, who resided at Calcutta, proved the will in the proper Ecclesiastical Court there, and collected and got in all the testator's property in the East Indies, and thereout paid his Indian debts and his funeral expences.

In the month of December

1829, three of the other executors proved the will in the Prerogative Court of Canterbury, in respect of the testator's personal estate in England, and paid debts of the testator in England to a trifling amount: a suit was instituted in the Court of Chancery, in the name of the infant children, against the executors, for the purpose of having the property administered according to the directions of the will.

The Master, by his report, in pursuance of the decree made in that suit, found that the testator's personal estate in England, at the time of his death, consisted of several sums of money and stock, and of certain debts due to him, and also of some wine and wearing apparel; and he further found that the testator was possessed of a large personal estate in India which was remitted to England between the month of November, 1831, and January, 1834, by George St. Patrick Lawrence, the executor in India, to the *executors* in England, and invested by the *latter* in the purchase of Three per cent. Consolidated Bank Annuities, which were subsequently transferred into the name of the Accountant-General, in trust in this cause.

In consequence of the judgment of the Master of the Rolls, by whom it was decided that, under the terms of the will, the testator was entitled to the whole of his property situate in England at the time of his death, (Arnold *v.* Arnold, 2 Myl. & K., 365), all the remaining legacies were to be provided for exclusively out of the proceeds of that personal estate which had been collected in India, and had been remitted by Mr. Lawrence from that country to the executors at home. This fund, however, amounting to £56,659. 8*s*. 9*d*., proved insufficient to pay those legacies in full; and in pursuance of an order of the Court, it was subsequently apportioned by the Master among the legatees in proportion to their respective legacies.

A claim having been made by the Commissioners of Stamps and Taxes for the payment of the Legacy Duty in respect of the legacies payable out of this fund; a petition was now presented by the executors, praying a declaration that the fund in question was not subject to Legacy Duty.

As this is perhaps one of the most important cases which have been decided, and as the principles

involved in it were most clearly and ably brought before the Court by the learned counsel, who appeared on behalf of the petitioners, it will not be considered out of place, to insert somewhat at length their arguments in support of the petition, particularly as this case was determined entirely on the authority of the adjudicated cases, subsequently to the ATTORNEY-GENERAL *v.* COCKERELL, and the ATTORNEY-GENERAL *v.* BEATSON, when it was distinctly held, that the above two cases were unquestionably overruled by the Court of Exchequer in the case of JACKSON *v.* FORBES, which was afterwards affirmed by the House of Lords, not but that the principle regulating the attachment of Legacy Duty under the Act of 36 Geo. III., cap. 52, had been settled ever since EWIN's case, which, as it has been seen, was decided solely on the Law of Domicile: however, this principle seems to have been for a time disregarded, not only from the above period, but, strange to say, that it remained virtually unnoticed even after the decision of THOMSON *v.* HER MAJESTY'S ADVOCATE-GENERAL, in the House of Lords, the Stamp Commissioners having actually received Legacy Duty, in more cases than one, on the personal assets of parties dying domiciled abroad.

The arguments urged in support of the petition against the claim, by Mr. *Wigram*, now Vice-Chancellor, and Mr. *Bethel*, were that, wherever a testator, having an English domicile, died in England, (whether his assets happened to be either at home or abroad,) the Legacy Duty attached upon all the personal assets out of which his legacies were payable; and that the converse of the proposition must equally hold, *viz.*, that when a testator died domiciled in a foreign country, the whole of such assets were exempt from Legacy Duty. That the two propositions were correlative, being both founded on the principle, that as in law moveable property follows the person of the owner, its incidents must be regulated (except where otherwise expressly provided) by the laws which determine the rights and liabilities of that owner. In the case of probate duty, in which the *situs* of the property determines the liability, a different rule prevails, *(Attorney General v. Dimond*, 1 Crom. & Jerv., 356; *Attorney*

General v. Hope, 8 Bligh, 44, N. S, & S. C, Crom., Mee. & R., 530) and for a very obvious reason, for the tax being imposed as a charge upon the authority which is given by the Ecclesiastical Court to the personal representative, with a view to perfect his title to administer the estate, it is of necessity confined to such property as he is enabled to recover by virtue of that authority; in other words, to property which is to be got in or received within the limits of that court's jurisdiction. The title to such property as is situated in foreign countries, if acknowledged at all, is acknowledged *ex-comitate* only, and is of course liable to be controlled and modified as each state may think proper with reference to its own institutions and policy, and the rights of its own subjects. Therefore it is that, although in point of fact the right of the foreign executor is usually admitted, he is required to take out a new probate in the country where he seeks to recover the assets, such probate, however, being merely auxiliary to the original probate, so far as regards the collection and distribution of the effects. STORY'S COMM. ON THE CONFLICT OF LAWS, 421, 423. The liability to Legacy Duty depends upon considerations wholly different, and is determined not by the *situs* of the property, the place where the legatees reside, or the country or court in which the property is administered, but simply and solely by the domicile of the party from whom it comes. The property which is now the subject of the claim was possessed and remitted to this country under the authority of the India probate, and any subsequent probate taken out here, with reference to that property, must be considered to be merely subordinate and ancillary to the Indian probate; it may be a form required by the practice of the Court of Chancery, but it is not essential to the due administrations of the estate. Whether any such probate, however, has or has not been obtained in this case is quite unimportant, the duty being imposed not on the estate collected by virtue of the probate, but on the legacies payable out of the assets of persons who come within the meaning of the Act. If that be so, could the circumstance of the assets being in this country to be administered here through the medium of the Court of Chancery constitute any

real distinction, while it is submitted that no such distinction is warranted hy the language of the statute; the plain import and effect of which is, that when the person upon whose property the duty was meant to attach, has been once got at, the legatee, whether English or foreign, and whether receiving his legacy in this country or abroad, shall equally he chargeable with the duty: if then this testator was not at the time of his death such a person as came within the meaning and contemplation of the Act, it would he absurd to snppose that any subsequent proceeding on the part of his personal representatives could ever bring him within its operation. It is evident that when a testator dies in India, whether his legatees he in that country or not, it is not a matter of necessity that his property should he made liable to Legacy Duty, and that if such liahility is to he incurred at all, it could only be through the spontaneous act or the caprice of his executors. The question, who is or is not a person contemplated hy the statute, cannot be left to be determined by accidental circumstances over which the party himself has no control. The right of the Crown must be fixed and ascertained: at the moment the testator dies, it attaches according to a general and uniform principle, and cannot he affected by suhsequent accidents, or hy the contingent and capricious act of other parties. Lord *Cottenham* (after stating the principal facts of the case,) said:—

"The question is, whether under the circumstances stated (for the particular provisions of the will do not appear to me at all to affect the question), the Legacy Duty is, or is not, to be charged in respect of the above mentioned legacies. This question, independently of the cases which have been decided, will turn upon the terms of the 36th Geo. III., cap. 52; for the subsequent Act of Parliament, the 48th Geo. III., cap. 149, does not appear to be material. The second section of the 36th Geo. III., cap. 52, imposes a Legacy Duty 'on every legacy given by any will of any person.' It is impossible that words more general than these could be used. The seventh section declares, 'that any gift by any will of any person, which shall by virtue of such will have effect, or he satisfied out of the personal estate of such person,

shall be deemed a legacy within the meaning' of that Act. This, also, is in terms as general as possible. When the Act speaks of 'any will of any person,' and of the legacies being payable out of the personal estate, it must, I think, be considered as speaking of persons and wills, and personal estates in this country, that being the limit of the sphere of the enactment. It is clearly not applicable to the East Indies. It is applicable to this country. If there had been no property in this country, it would not have been necessary to prove the will here, quoad the property in India. There was no testator, will, or property in this country; and it was clear that of such property the Ecclesiastical Court would not have cognisance, its authority being confined to property within the limits of its own jurisdiction." Upon that ground, it was held in the ATTORNEY-GENERAL *v.* DIMONN, 1 Crom. & Jerv., 356, (see also ATTORNEY-GENERAL *v.* HOPE, 8 Bligh 44., N. S.) that probate duty would not be payable upon property so situated.

4th. *That the liability to Legacy Duty does not depend on the act of the executor in proving the will in this country, or upon his administering here.*

Having shewn that, by virtue of the Act, the duty attaches on the corpus fund, the subject matter of the legacy duty, so long as that legacy is within the act, and not on any receipt or document evidencing payment by the executor, and having shewn that, to bring the legacy within the Act, certain extrinsic facts must be proved, one of the most important of which is, that of the testator being domiciled at the time of his death in Great Britain, it would appear almost impossible that any act of an executor could cause the duty to attach in a case where, irrespective of such Act, no duty could be claimed; and yet in the two cases of the ATTORNEY-GENERAL *v.* COCKERELL, and the ATTORNEY-GENERAL *v.* BEATSON, such was the principle acted on, a principle however, which was repudiated before the case in the text was decided by Lord *Cottenham*, in ARNOLD *v.* ARNOLD, who, when comparing the facts of the case in which he was giving judgment with those in the ATTORNEY-GENERAL *v.* JACKSON, said, that the only difference in the facts of the two cases was, that in the

latter, there was no representation in this country; the executors, when they came to England, not having taken out probates here, although throughout the proceedings, the contrary was assumed to be the fact; but, it is quite impossible, he continues, while shewing that such a difference was immaterial, to suppose that the liability of legacies to the duty can depend upon the act of the executor in proving or not proving the will in this country: the question being not whether there be probate or letters of administration in England, but whether, within the meaning of the Act of Parliament, the property out of which the legacies are payable, be the property of a person which passes by the will of that person within the meaning of the Act. And again, in reference to LOGAN *v.* FARLIE, we find that Sir John Leach attached much importance to the fact of specific appropriation to the use of the legatee for in his judgment he says; "If the testator die in *India*, and his personal estate is wholly in *India*, and his executors be resident there, and the will be proved there, and the executor remit to a legatee in England, or to some other person in England for the specific use of the legatee, the amount of his legacy, I am of opinion that the legacy duty is not payable upon such a remittance, inasmuch as the whole estate is administered in *India*, and the remittance is in respect of a demand, which is to be considered as established there; but if a part of the assets be proved in England in the hands of an agent of the executor without specific appropriation, and a legatee in England institute a suit for the payment of his legacy out of such unappropriated assets, such assets are to be considered administered here, and liable to legacy duty." It was, however, held that, if the payment had been made to the legatee direct, the legacy duty would not have been payable,—in fact, this case was decided on the non-appropriation of the funds remitted to this country; and Lord Cottenham, when commenting on this case, in Arnold *v.* Arnold, said, "Sir John Leach held the duty payable, because the agent of the executor in India was empowered to pay the legacy to the legatee, who was first entitled, but had no authority, as he supposed, to pay it to those who were to take in the event of the first

legatee being dead. When that case came before Mr. Justice Bosanquet and myself, 8 Bligh 15., N. S., the ATTORNEY-GENERAL *v.* JACKSON had been decided in the House of Lords," but, independently of that case, said Lord Cottenham, " we were of opinion that Sir John Leach's decision could not be supported upon his own principle, because we thought there had been an appropriation in India, and a remittance for the purpose of paying the legacy in a certain event to the children of the first legatee." That decision, therefore, proceeding as it did on the misapplication of a fact, namely, the extent of the authority with which the agent in this country was invested, and not upon the construction of the Act of Parliament, it is evident that his lordship considered the case of ATTORNEY-GENERAL *v.* JACKSON to have overruled LOGAN *v.* FAIRLIE, long before it came under his adjudication; for when, as Commissioner Pepys, he delivered the judgment of the Court in the latter case, when brought before the Court a second time under the same name, in the year 1835, he said, " The question is whether the Attorney-General *v.* Jackson has not covered this case. We think it has covered a great deal more, and that therefore this case is necessarily within it." Besides which, the notion of the mere Act of Administration having, under any circumstances, any thing to do in attaching the Legacy Duty on personal estate, which otherwise would not have been liable to such duty, was also settled, it being expressly laid down in RE BRUCE, by Mr. Baron *Bailey*, that probate or administration in this country does not render the personal assets of a testator domiciled and dying abroad, subject to the payment of legacy duty. In this case there was probate and administration in this country, and upwards of £30,000 bequeathed to legatees in England, all of whom resided in England; but the Judges held the legatees were exempt from Legacy Duty, the executor being simply the medium by which the property belonging to the testator was to be distributed.

On reference to the case of JACKSON *v.* FORBES, 2 C. & Jer. 382, on appeal, under the title of ATTORNEY-GENERAL *v.* JACKSON, and reported as above in 8 Bligh 15., N. S., the facts of which will be found to differ little from

those in Arnold *v.* Arnold, except that in the former there was no representation in England at all, probate not having heen taken out by the executors here, although it was assumed throughout the argument, that such had heen the case; yet, notwithstanding such assumption, it was distinctly held that the mere act of the executor could have no influence on the attachmcnt of the Legacy Duty, if the legatees were not liahle to its payment upon other and more cogent grounds. The dictum of the then present Master of the Rolls, in Logan *v.* Fairlie, was relied on, "That if part of a testator's assets he found in *England* in the hands of the agent of the executor, without any *specific appropriation*, and a legatee in *England* should institute a suit here for the payment of his legacy out of such unappropriated assets, then such assets are to he considered as administered in *England*, and the Legacy Duty is payable in respect of them. But it was contended that if the argument for the Crown was to prevail, property in every foreign colony might be made liahle to Legacy Duty, if the legatee or executor either came to England or shifted it hither; and *Lord Lyndhurst, C.B.*, put the case of a French or German testator leaving an executor who came to *England* or invested the property in *England*, whether it would not, according to this argument, be liable? inasmuch as the result *quoad* legacy duty would be the same as if the property had been originally situated within the province of Canterbury, and the testator had lived and died in England. It would he easy to multiply cases to show how uncertain and unjust it would be to make the attachment of the duty depend upon the mere act of the executor; but it is submitted that a mere reference to those instances cited in *Attorney-General* v. *Forbes*, will be all-sufficient to prove that it does not so depend, as was observed in that case:—suppose the executor had never come within the jurisdiction of the English Courts, or having collected the assets in India under the Indian administration, had sent over the legacies to the legatees here; how could they he made amenable?—for the remedy would he only personal against them; or if the testator being resident abroad, were to make use of an expression in his will difficult of interpretation,

so as to render it desirable or necessary to apply to an English court to interpret it, this fiscal enactment would then apply, whereas, if the will be so clear as to be capable of being acted on at once, it would not. Again, upon the question of appropriation, suppose that the executor chose to pay through a banker here, it would be no appropriation, but if be came here, and paid in person, it would be. So that if a *British* subject should make a will in *Paris*, where he was domiciled, bequeathing stock in the *French* funds to two legatees in moieties, and should appoint an *Englishman* his executor, who, after taking out the French administration, might return to England, where the legatees might follow, and compel him in an *English* court to transfer the *French* funds to them, it would follow that, by the accidental presence of the executor within the jurisdiction of the court, the legacy duty would be payable by the objects of the testator's bounty, and that the property would be considered as property in *England*, within sec. 6 of the Legacy Duty Act. So that if such were the rule, it would necessarily follow that the payment of the legacy duty would depend on the accidental circumstance of the money being paid, or appropriated here, on the caprice of the personal representative; for in the event of the executor remaining where he proved and administered the will, beyond the jurisdiction of the Ecclesiastical Court here, the duty would not attach.

5th. *That the statute is limited in its operation to Great Britain, not extending to Ireland or to the Colonies, and therefore, notwithstanding the general terms contained in the schedule, these terms must be read in connexion with the first section of the Act.* That this Act could not be intended to extend to the wills of persons domiciled out of Great Britain is clear, from the general principle, which limits the operation of the statutes, namely, that they do not extend to the colonies or other dependencies of the Crown unless specific mention be made of such an intention on the part of the legislature. See 1 BLACK. COM., 107. In the 36th Geo. III., cap. 36, there is no express provision to this effect, and therefore its operation ought to be, and is, confined to parties domiciled within Great Britain. But there is another reason which might

be fairly urged in support of this limitation, namely, that the statute confers no benefit, but, on the contrary, is purely fiscal in its nature, and, as such, is to be strictly confined in its application, and in no case to be extended by implication only. One consequence of the effect of deciding that this Act extended to India or to Ireland, and other places not expressly mentioned, is clearly stated in the argument of Mr. *Wigram*, in the case of ARNOLD *v.* ARNOLD, who put a supposititious case of a testator dying domiciled in Ireland, (where the scale of duties was different,) and who left personal estates, both there and in this country. If the executor of such a testator were to take out an auxiliary probate in England, with a view to the complete administration of the estate, would the legatees be subject to the English rate of duty because the estate is partly administered here? or to the Irish rate, because the testator was domiciled in Ireland? or to both? The Revenue Law made for Ireland must, in the absence of a special provision to the contrary, regulate the liabilities of the Irish people in their persons and in their property. And Mr. Baron Bayley, in the case of RE EWIN, 1 Crom. & Jerv., 151, expressly laid it down, that the Legacy Acts are co-extensive with this kingdom, and do not extend to the territorial possessions of the crown in India.

In conclusion, it is submitted that bequests of personal property which are subjected to the payment of Legacy Duty, as contemplated by the Act of Parliament, must be of property situate in this country, either *de facto* or *de jure*, by means of the owner being domiciled in *Great Britain* at the time of his decease, for the domicile of the person regulates the *situs* of his personal property.

With respect to the measures which should be taken to obtain repayment of duty made under a misapprehension of the facts or of the law, we subjoin a short extract from Mr. Gwynne's able little book, on the ratio payable on Probate and Legacy Duty, from which our readers will gain the necessary information.

"In any case in which Legacy Duty has been improperly paid, the Commissioners of Stamps are at liberty to return it, and no time is limited for the application. But the Commissioners require that the grounds on which the

return is claimed be fully stated on affidavit, and that the party claiming the return, or some person on his behalf, shall attend at the Legacy Duty Office in London, to establish the case by such evidence as the comptroller of the legacy duties may deem it proper to call for, and to receive the duty if the claim be allowed. And it is also necessary that the stamped receipt for the duty paid in error should be given up to the office, either to be cancelled, or to be specially indorsed with a record of the repayment, according to the particular circumstances of the case. As every case of a claim to a return of Legacy Duty is founded on its peculiar circumstances, it is obvious that no printed forms of affidavit are prepared for such cases, but the particular circumstances of each must be set forth by the applicant himself, or his solicitor."

APPENDIX.

36 Geo. III., cap. 52.

An Act for repealing certain Duties on Legacies and Shares of Personal Estates, and for granting other Duties thereon, in certain cases.

Preamble, 20 Geo. 3, c. 28, 23 Geo. 3, c. 58 and 59 Geo. 3, c. 51.

Whereas it is expedient that the duties imposed by divers Acts of the twentieth, twenty-third, and twenty-ninth years of your Majesty's reign, on every skin or piece of vellum or parchment, or sheet or piece of paper, upon which any receipt or other discharge for any legacy left by any will, or other testamentary instrument, or for any share or part of a personal estate, divided by force of the statute of distributions, or the custom of any province or place, should be engrossed, printed, or written, should be repealed as to such receipts or discharges, for which new duties shall be granted by this Act; and that new duties should be granted in lieu of the duties so repealed; and that the provisions made by the said several Acts, for collecting the duties thereby imposed, should be further enforced, as to the duties which shall not be repealed by this Act: We, your Majesty's most dutiful and loyal subjects, the Commons of Great Britain, in Parliament assembled, as well for the purposes aforesaid, as towards raising the necessary supplies to defray your Majesty's public expenses, and making such permanent addition to the public revenue as shall be adequate to the increased charge occasioned by any loan made by virtue of any Act or Acts for that purpose,

passed or to be passed in this session of Parliament, have freely and voluntarily resolved to grant unto your Majesty the duties hereinafter mentioned; and do most humbly beseech your Majesty, that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, That the several duties by the said several Acts imposed on all receipts and discharges for legacies given by any will or other testamentary instrument, and for shares or parts of residue of personal estate upon which any duty shall be imposed by this Act, shall, from and after the passing of this Act, cease, determine, and be no longer paid or payable; and so much of the said several acts as relate to such duties so repealed, and the payment thereof, shall be, and the same are hereby also repealed.

Duties imposed by the before mentioned Acts on receipts for legacies or residues of personal estates, on which new ones are hereby laid, to cease.

New duties.

Sec. 2. And be it further enacted, that upon every legacy specific or pecuniary, or of any other description, of the amount or value of twenty pounds or more, given by any will or testamentary instrument of any person who shall die after the passing of this Act, out of the personal estate of the person so dying, and also upon the clear residue, and upon every part of the clear residue of the personal estate of every person who shall so die, whether testate or intestate, and leave personal estate of the clear value of one hundred pounds or upwards, which shall remain after deducting debts, funeral expenses and other charges, and specific and pecuniary legacies (if any), whether the title to such residue, or to any part thereof, shall accrue by virtue of any testamentary disposition, or upon intestacy, there shall be raised, levied, collected, and paid unto, and for the use of his Majesty, his heirs and successors, the several duties after the rates and in manner following, (that is to say)—where any such legacy, or

any residue, or part of residue of any such personal estate shall be given, or shall pass to or for the benefit of a brother or sister of the deceased, or any descendant of a brother or sister of the deceased, there shall be charged a duty of £2 for every £100 of the value of any such legacy or residue, or part of residue, and so after the same rate for any greater or less sum; where any such legacy, or any residue or part of residue of any such personal estate shall be given, or shall pass to or for the benefit of a brother or sister of a father or mother of the deceased, or any descendant of a brother or sister of a father or mother of the deceased, there shall be charged £3 for every £100 of the value of such legacy, or residue, or part of residue, and so after the same rate for any greater or less sum; and where any such legacy, or any residue, or part of residue of any such personal estate, shall be given or shall pass to or for the benefit of a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased, there shall be charged a duty of £4 for every £100 of the value of such legacy, or residue, or part of residue, and so after the same rate for any greater or less sum; and where any such legacy, or residue, or part of residue of any such personal estate, shall be given, or shall pass to or for the benefit of any person in any other degree of collateral consanguinity to the deceased than is hereinbefore described, or any stranger in blood to the deceased, there shall be charged a duty of £6 for every £100 of the value of such legacy, or residue, or part of residue, and so after the same rate for any greater or less sum: Provided always, that nothing herein contained shall extend to charge with any duty any legacy, or any residue, or part of residue, of any personal estate, which shall be given, or shall pass to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the royal family.

Duties not to extend to bequest to husbands or wives, or the royal family.

Duties to be under the management of the commissioners for stamps.

Sec. 3. And be it further enacted, that the said duties shall be under the care, management, and direction of the commissioners for the time being appointed to manage the duties on stamped vellum, parchment, and paper, who, or the major part of them, are hereby empowered and required to employ the necessary officers under them for that purpose, and to cause four new stamps to be provided to denote the several rates of duties hereby imposed; that is to say, one stamp to denote the rate of £2 per centum, one other stamp to denote the rate of £3 per centum, and one other stamp to denote the rate of £4 per centum, and one other stamp to denote the rate of £6 per centum, and the same to alter or renew whenever it shall be requisite, and to do all things necessary for carrying this Act into execution, according to the rules, methods, and directions herein contained, in as full and ample a manner as they, or the major part of them, are authorised and empowered to put in execution any law concerning stamped vellum, parchment, or paper.

Sec. 4. Provides that commissioners should appoint receivers of the duties, and keep accounts, shewing the personal estates in respect of which the duties have been paid.

Sec. 5. Provides that commissioners should furnish printed receipts, which may be used, or others of the like forms.

Duties to be paid by executors or administrators on retaining or paying legacies.

Sec. 6. Enacts that the duties hereby imposed shall, in all cases in which it is not hereby otherwise provided, be accounted for, answered, and paid by the person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer, for his, her, or their own benefit, or for the benefit of any other person

or persons, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled so to retain either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, to which any other person or persons shall be entitled; and in case any person or persons having or taking the burthen of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy, or any part of any legacy, or the residue of any personal estate, or any part of such residue which such person or persons shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of this Act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or any part of any legacy, or the residue of any personal estate, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable by virtue of this Act, having received or deducted the duty so chargeable, then, and in every of such cases, the duty which shall be due and payable upon every such legacy and part of legacy, and residue and part of residue respectively, and which shall not have been duly paid and satisfied to his Majesty, his heirs and successors, according to the provisions of this Act, shall be a debt of such person or persons having or taking the burthen of such execution or administration as aforesaid to his Majesty, his heirs and successors; and in case any such person or persons so having or taking the burthen of such execution or administration as aforesaid, shall deliver, pay, or otherwise howsoever

satisfy or discharge any such legacy or residue, or any part of such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon, (such duty not having been first duly paid to his Majesty, his heirs or successors, according to the provisions herein contained,) then, and in every such case, such duty shall be a debt to his Majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the said shall be made.

What shall be deemed legacies within the meaning of this Act.

Sec. 7. Enacts that any gift by any will or testamentary instrument of any person dying after the passing of this Act, which shall, by virtue of such will or testamentary instrument, have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy, within the intent and meaning of this Act, whether the same shall be given by way of annuity, or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix, who shall give the same; except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the will or testamentary instrument, by which the same shall be given, and every gift which shall have effect as a donation *mortis causâ*, shall also be deemed a legacy, within the intent and meaning of this Act.

Sec. 8. Provides that the value of annuities, and the duty, be calculated according to the tables annexed to this Act, and that the duty be paid by instalments, &c.

Sec. 9. Provides that the value of annuities payable out of legacies, and the duty, be calculated according to the

tables to this Act annexed, and the duty be charged on the value of such legacies, after deducting such annuities, &c.

Sec. 10. Provides that duty on legacies given to purchase annuities be calculated on the sums necessary to purchase them.

Sec. 11. Provides that the duty on legacies, whose value can only be ascertained by application of the allotted fund, be charged on the money as applied.

Sec. 12. Provides how the duty on legacies enjoyed by persons in succession or having partial interests therein, shall be charged.

Sec. 13. And by whom payable.

Sec. 14. Provides that plate, &c., while enjoyed in kind, shall not be liable to duty till in possession of persons having power to dispose thereof.

Sec. 15. Provides that the duty on legacies enjoyed in succession be charged as such, whether taken under wills or by intestacy.

Sec. 16. Provides that the duty on legacies in joint tenancy be paid in proportion to the interest of the parties.

Sec. 17. Provides that the duty on legacies, subject to contingencies, be charged as for absolute bequests, &c.

Sec. 18. Provides how the duty on legacies, subjected to power of appointment, shall be charged.

Sec. 19. Provides how the duty is to be charged on personal estates, directed to be applied in purchase of real estates.

Sec. 20. Provides that estates *pur autre vie*, applicable as personal estates, are to be charged as such.

Sec. 21. Provides that money left to pay the duty shall not be chargeable as a legacy.

Sec. 22. Provides for the means of ascertaining the duty on property not reduced into money.

Sec. 23. Provides that the duty on legacies not satisfied in money, &c., shall be paid according to the value of the satisfaction.

Sec. 24. Provides that if legatees refuse to accept legacies, duty deducted, the Court, in case of suit, may order them to pay costs; and in suits where the party sued may wish to stop proceedings, on payment of bequests, deducting duty, the Court may make order therein.

Sec. 25. Provides that if a suit be instituted concerning administration, the Court shall provide for the payment of the duty.

Sec. 26. Provides that executors may discharge legacies on payment of the duty accrued.

Sec. 27. Provides that no legacy liable to duty shall be paid without a receipt containing certain particulars, and that no receipt shall be available unless duly stampt, &c. Copy of entry at Stamp Office of payment of duty, evidence. Stampt receipts for annuities not required, but on completing payments for each of the first four years.

Sec. 28. Provides a penalty of £10 per cent. for paying or receiving legacies without stampt receipts.

Sec. 29. Provides that receipts are to be stampt within twenty-one days after date, on which an acknowledgment of payment of the duties shall be written, &c.: receipts may be stampt within three months after date on payment of duty,

and £10 per cent. penalty; but none are to be stampt unless the duty be paid, and they are brought to be stampt within the limited time.

Sec. 30. Provides that mistakes in paying duty may be rectified, if no suit be instituted, on payment of the difference within three months, and £10 per cent.

Sec. 31. Provides that persons paying or receiving money for legacies contrary to this Act shall be indemnified on discovering the other offender.

Sec. 32. Provides that, if by infancy or absence, legacies cannot be paid, the money may be paid into the Bank of England, and laid out in the Three per Cents.

Sec. 33. Provides that if it shall appear to the Commissioners for Stamps, at the end of two years after the death of any person, that it will require time to collect the effects, or be difficult to ascertain the residue of the personal estate, the duty may be compounded for; and duty shall be paid on any part of personal estates not included in the computation.

Sec. 34. Provides that if any legacy be refunded the duty shall be repaid.

Sec. 35. Provides that executors are, previously to retaining their own legacies, to transmit the particulars with the duty offered, to the Commissioners of Stamps, who shall charge the same agreeably to this Act. Penalties for neglect of payment of duty for fourteen days.

Sec. 36. Provides that receipts for legacies, except those by will, respecting which the duties imposed by Acts mentioned in the Preamble, are repealed, are to be deemed receipts within the meaning of those Acts, and such receipts

are to be given for legacies due at the passing of this Act, and for legacies becoming due afterwards, on which no duty is hereby imposed.

Sec. 37. Provides that if administration be made void, and any duty be improperly paid, it shall be repaid, but if it ought to have been paid, it shall be allowed in account with the rightful executor.

Sec. 38. Provides that persons answering falsely shall be guilty of perjury.

Sec. 39. Provides that there shall be a penalty of £500 for altering any word, letter, figure, or number, of any assignment or receipt.

Sec. 40. Provides that persons forging stamps shall suffer death. (Since altered.)

Sec. 41. Provides that any receipt duly stampt shall be exempted from all other duties imposed on receipts generally.

Sec. 42. Provides that the powers of former Acts relating to stamps shall extend to this Act.

The remaining clauses of 36 Geo. III., cap. 52, are not important to the objects of this work.

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